IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY JAMES GAMBLE, Petitioner,	)	
vs.	)	No. 76-C-452-C
STATE OF OKLAHOMA, et al., Respondents.	)	

O R D E R

The Court has before it for consideration the Petition of Larry James Gamble for a Writ of Habeas Corpus, filed pro se purusant to Title 28 U.S.C. § 2254. Respondent has filed a response, pursuant to an order of the Court directing it to show cause why the writ should not be granted.

Petitioner was convicted in the District Court of Tulsa County, by a jury, of the offense of Unlawful Possession of Controlled Drugs with Intent to Distribute, and by the Court, sitting without a jury, of the offense of Unlawful Possession of Controlled Drugs. For the first conviction petitioner received a sentence of thirty-five (35) years' imprisonment in the Oklahoma State Penitentiary. The Court imposed a sentence of five (5) years' imprisonment for the second conviction, to run concurrently with the first sentence. The judgments and sentences of the District Court were affirmed by the Oklahoma Court of Criminal Appeals. Gamble v. State, 546 P.2d 1336 (Okl. Cr. 1976). Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. In particular, petitioner claims:

1. Petitioner's unlawful arrest without probable cause and without a warrant rendered execution by police officers of a

search warrant violative of the Fourth and Fourteenth Amendments, and evidence seized as a result thereof was inadmissible at the state court trial.

2. The denial of petitioner-defendant's request for production of the informant or for a disclosure of his identity deprived petitioner of a fair trial and due process of law cognizable in habeas corpus proceedings under the Supreme Court mandate of Roviaro v. United States.

3. The convictions, judgments and sentences entered contravene the Supreme Court mandate of Brown v. Illinois. These same arguments, among others, were raised in the Tulsa County District Court in petitioner's Application for Post-Conviction Relief, filed pursuant to Title 22 O.S. § 1080 et seq. Denial of this Application was affirmed by the Oklahoma Court of Criminal Appeals. Petitioner has exhausted available state remedies.

In determining whether an evidentiary hearing is necessary prior to ruling upon the validity of petitioner's allegations, this Court must look to the requirements established by the United States Supreme Court in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding."
> 372 U.S. at 312

In the instant case, it appears that the facts underlying petitioner's propositions were adequately developed during the trial process and that consideration of the propositions will require the Court merely to draw legal conclusions from these facts. For this reason, the Court deems it unnecessary to conduct an evidentiary hearing.

The allegations contained in petitioner's first proposition were raised by his trial counsel (Tr. 67; 115-117) and considered

by the trial court. The court held evidentiary hearings on the matter and ruled that the search warrant was valid and that the search was not tainted by any prior police conduct. Tr. 117-118. The same argument was raised and rejected on petitioner's direct appeal. Gamble v. State, supra at 1341. Therefore, the Court finds that petitioner has been provided with an opportunity for full and fair litigation of this Fourth Amendment claim. Consequently, the Court is precluded from considering the claim again in this proceeding. Stone v. Powell, 44 LW 5313 (July 6, 1976).

Petitioner's second proposition concerns the State's refusal to provide him with the identity of the person whose information was used as the basis for procuring the search warrant in question. In support of his position, petitioner cites Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). As a general rule, the Government has a privilege to withhold from disclosure the identity of such informers in order to protect the public interest in effective law enforcement. 353 U.S. at 59. Roviaro recognized, however, that certain circumstances might require the disclosure of the informer's identity. In that case, the defendant was charged with receiving, concealing, buying and facilitating the transportation of heroin. The transaction which was the subject of the charge was participated in by only two persons, the defendant and the informer, John Doe. Doe's part in the transaction was described by other Government witnesses, and a conversation between the defendant and Doe was described by a witness who overheard it. The Court noted that Doe had helped to set up the criminal occurrence and had played a prominent part in it and said that "[w]hile John Doe is not expressly mentioned, this charge, when viewed in connection with the evidence introduced at the trial, is so clearly related to John Doe as to make his identity and testimony highly material." 353 U.S.

at 63. Under these circumstances, the Court held that the refusal to order disclosure of the identity of John Doe was prejudicial error.

The facts in the instant case are distinguishable from those in Roviaro. Here, the charges were based on possession rather than any single transaction. No reference was made to the informer during the trial. His purpose was only to serve as the basis for probable cause to issue a search warrant. The basis of the State's case on the first charge was the existence of large quantities of drugs rather than any specific sales to any individuals. Neither charge was "closely related" to any individual. The Court therefore finds that Roviaro is not applicable to the facts in the instant case and that petitioner's second proposition is without merit.

In his final proposition, petitioner contends that the State courts failed to follow the holding of the United States Supreme Court in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). The defendant in that case was arrested without probable cause and without a warrant. Thereafter, while in custody in a police station, he made two inculpatory statements after being advised of his rights under Miranda v. Arizona. His pre-trial motion to suppress the statements was denied, and evidence of both statements was introduced at his trial. His conviction was affirmed by the Supreme Court of Illinois, which held that the Miranda warnings, in and of themselves, served to break the causal connection between the illegal arrest and the giving of the statements. The United States Supreme Court reversed, holding that even if the statements were voluntary under the Fifth Amendment, they should have been examined in light of the Fourth Amendment considerations enunciated in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). In Wong Sun, which involved the application of the exclusionary rule to prohibit the introduction of evidence obtained

as a result of an unlawful arrest, the Court said:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." 371 U.S. at 487-488.

The Court in Brown held that the question of whether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. As factors to be used in making this determination, the Court listed the Miranda warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. The Court found that Brown's statements did not pass the test of Wong Sun, in that the first statement was separated from his illegal arrest by less than two hours, there was no intervening event of significance whatsoever, and the illegality had a quality of purposefulness. In a concurring opinion, Mr. Justice Powell discussed the Court's holding in light of the deterrent purpose of the exclusionary rule. He distinguished two categories of Fourth Amendment violations: "flagrantly abusive" and "technical". In the latter category he placed good faith arrests in reliance on warrants later invalidated or pursuant to a statute that subsequently is declared unconstitutional. As to the former category, he said:

> "I would require the clearest indication of attenuation in cases in which official conduct was flagrantly abusive of Fourth Amendment rights. If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives, . . . I would consider the equalizing potential of Miranda warnings rarely sufficient to dissipate the taint. . . . I thus would require some demonstrably effective break in the chain of events leading from the illegal arrest to the

> statement, such as actual consultation with counsel or the accused's presentation before a magistrate for a determination of probable cause, before the taint can be deemed removed. . ." 422 U.S. at 610-611.

The facts in the instant case closely parallel those in Brown. At approximately 4:20 P.M. on November 20, 1974, two undercover Tulsa Police Department Officers, Donald Bell and Robert Boston, approached a residence at 623 East 54th Street North, in Tulsa, for the purpose of conducting a search of that residence for narcotics, pursuant to a search warrant which had been issued earlier that day. The officers observed an automobile back out of the driveway and leave the residence, and they began to follow it. Bell requested a uniformed officer of the Tulsa Police Department, in a marked police car, to stop the automobile and hold the driver until Bell and Boston arrived. Bell candidly admitted that the only reason he requested that the car be stopped was to determine who was in it. Tr. 71. If it was the petitioner, Bell wanted to take him back to the residence so that he would be present when the search warrant was executed. Id., at 72. The car was stopped by the uniformed officer, and petitioner was detained until Bell and Boston arrived. Upon their arrival, Bell, armed with a service revolver and a .12 gauge shotgun, ordered petitioner to drive him to the residence on East 54th Street North. Petitioner did so, and was then forced by Bell, at gunpoint, to open the door to the residence with his key. Bell testified that he handed the search warrant to petitioner before they entered the residence, while petitioner contended that Bell laid it on a counter after they were inside. Sometime during the search petitioner was formally placed under arrest and advised of his Miranda rights. After being so advised, petitioner was asked if there were any additional drugs in the residence, to which he replied, according to the testimony of Bell, that ". . . the drugs in the residence were all in this one particular bedroom and that the remainder of the house . . .

was clean." Tr. 92. Both the judge at the preliminary hearing and the trial judge found the arrest to be illegal. Preliminary hearing tr. 115; Tr. 67, 114-115. Petitioner's motion to suppress all evidence obtained and statements made by him as fruits of the unlawful arrest was sustained by the trial judge as to evidence seized prior to entry into the house and statements made prior to the giving of the Miranda warnings. Tr. 67. Petitioner was convicted by a jury on the first charge on March 6, 1975 and by the court sitting without a jury on the second charge on March 25, 1975. The two charges were both based upon evidence seized during the same search, and the evidence presented during the jury trial was used as the basis for petitioner's non-jury conviction.

The similarities between the instant case and Brown are apparent. The "primary illegality" in this case, the unlawful arrest, was clearly established. By the Testimony of the arresting officers themselves, their intent from the outset was to exploit that illegality, namely to ensure petitioner's presence at the residence at the time of the search and thus to simplify the burden of proving his possession of the narcotics. Evidence obtained as a result of this exploitation therefore was "fruit of the poisonous tree", and application of the factors listed in Brown indicate that petitioner's statements should have been excluded. The statements in this case followed the initial arrest by no more than one hour. There were no intervening circumstances of any significance between the arrest and the statements. The police conduct was, by almost any interpretation, "flagrantly abusive" of petitioner's Fourth Amendment rights.

The facts of the instant case therefore indicate that this may be a proper instance for the granting of relief under Title 28 U.S.C. § 2254. It is clear from the record that petitioner's statements were used as one of the bases for his convictions. As previously noted, the jury heard testimony concerning petitioner's

statements. The prosecutor relied heavily upon these statements in his closing arguments to attempt to demonstrate petitioner's knowledge and control of the drugs. Tr. 131, 135, 139. During their deliberations, the jury asked to see a copy of the testimony relating to these statements. Tr. 142. The Oklahoma Court of Criminal Appeals cited the statements in support of its ruling that the State had sufficiently established petitioner's knowledge, dominion and control of the heroin. Gamble v. State, supra, at 1343. As noted above, the evidence presented during the jury trial was used as the basis for petitioner's non-jury conviction. The Tenth Circuit has held Brown applicable to federal habeas corpus cases and has said that there is no need to consider whether Brown should be applied retroactively because the decision merely clarified Wong Sun and did not establish any new law. Stevens v. Wilson, 534 F.2d 867 (10th Cir. 1976). However, because Brown's purpose is to protect Fourth Amendment rights, this Court must consider petitioner's proposition in light of Stone v. Powell, supra. The Court in that case attempted to weigh the utility of the exclusionary rule in deterring unlawful police conduct against the costs of extending it to collateral review of Fourth Amendment claims. The conclusion reached by the Court was that the deterrent effect of the exclusionary rule is minimal where federal habeas corpus relief is sought by a prisoner whose search-and-seizure claim was considered at trial and on direct review. The Court held that

> ". . . where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." 44 LW at 5321.

This Court must therefore determine whether petitioner has been provided "an opportunity for full and fair litigation" of his Fourth Amendment claim under Brown v. Illinois. Construing "opportunity" in its most liberal sense, petitioner was provided

an opportunity to litigate this claim. Petitioner's trial was conducted prior to the decision in Brown, which was decided on June 26, 1975. He was thus unable to bring this case to the attention of the trial court, although he did move to suppress his statements as the products of an unlawful arrest. Petitioner did bring the Brown case to the attention of the Oklahoma Court of Criminal Appeals, which affirmed his conviction on March 4, 1976. In his application for post-conviction relief in the Tulsa County District Court, petitioner argued that Brown should control the disposition of his case. His application was denied on July 19, 1976, and this denial was affirmed by the Oklahoma Court of Criminal Appeals on August 11, 1976. Assuming, without deciding, that petitioner's arguments directed at the Oklahoma State courts satisfied the State's requirement under Stone v. Powell to provide petitioner with an "opportunity" to litigate his Fourth Amendment claim, the Court must also consider whether this opportunity was "full and fair." The written opinion of the Oklahoma Court of Criminal Appeals affirming petitioner's conviction makes no reference to Brown v. Illinois or to petitioner's arguments in reliance upon it, although less than two months prior to this decision, the same Court had reversed a conviction on the basis of the trial court's failure to apply the standards required by Brown in determining the voluntariness of a confession. Batie v. State, 545 P.2d 797 (Okl. Cr. 1976). In its order denying petitioner's application for post-conviction relief, the Tulsa County District Court said that ". . . the argument of the defendant [based upon Brown] is without merit in that since the miranda [sic] warnings were given statements could be used against the defendant." This is the same rationale which was used by the Illinois Supreme Court in Brown and condemned by the United States Supreme Court. The Oklahoma Court of Criminal Appeals did not discuss petitioner's argument in its one-page order affirming the denial of post-conviction relief.

Based upon this lack of consideration by the Oklahoma State courts of petitioner's arguments in reliance upon a United States Supreme Court case almost directly in point, this Court finds that any opportunities which the State of Oklahoma might have provided to petitioner to litigate this Fourth Amendment claim were not "fair." Consequently, Stone v. Powell does not preclude this Court from considering petitioner's final proposition.

Therefore, based upon its analysis of the record before it, the Court finds that petitioner's constitutional rights were violated during the course of his prosecutions and that the convictions based on the tainted evidence cannot stand. It is the order of the Court that the writ of habeas corpus be granted, and the Court orders respondent to release petitioner from State custody if he is not afforded a new trial within ninety (90) days.

It is so Ordered this 31st day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

INTERSTATE COMMERCE COMMISSION, Plaintiff, vs. WORLD TRAVEL SERVICE, LTD. and M. K. & O. HIGHWAYS TOURS, INC., Defendant.	)	Civil Action No. 77-C-80-C

CONSENT DECREE

This cause having come on for consideration by this Court on the pleadings and Stipulation filed by the parties:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This action is hereby dismissed with respect to Defendant M. K. & O. Highways Tours, Inc.;

2. Judgment is entered in favor of Plaintiff Interstate Commerce Commission against Defendant World Travel Service, Ltd.;

3. The Defendant World Travel Service, Ltd., its agents, employees and representatives, and all other persons, firms and corporations acting by or under its direction and authority or in active concert or participation with it, be permanently enjoined and restrained from, in any manner or by any device, directly or indirectly holding itself out to sell or offer for sale transportation subject to Part II of the Interstate Commerce Act for compensation and from holding itself out by advertisement, solicitation or otherwise as one who sells, provides, brokers, contracts, or arranges for such transportation in violation of the Commission's Order of May 28, 1974, in Docket No. MC-C-8186, Allan S. Kraft dba Universal Travel Service vs. World Travel Service, Ltd., unless and until it holds a broker's license issued by the Commission to engage in such transactions and advertising;

4. At any time after two years from the date of entry of this Decree, on application of Defendant World Travel Service, Ltd. with notice to Plaintiff Interstate Commerce Commission and upon a showing that Defendant World Travel Service, Ltd.

has complied with the terms of this Decree and the Commission's Order of May 28, 1974, in Docket No. MC-C-8186, Allan S. Kraft dba Universal Travel Service vs. World Travel Service, Ltd., the injunction set forth in paragraph 3 hereof shall be vacated; and

5. Each party to this action shall bear its own costs.

DONE at Tulsa, Oklahoma, this 31st day of March, 1977.

H. DALE COOK
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Simon W. Oderberg
ATTORNEY FOR PLAINTIFF,
INTERSTATE COMMERCE COMMISSION

R. Casey Cooper
ATTORNEY FOR DEFENDANT,
WORLD TRAVEL SERVICE, LTD.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ARLING MEDINA, Petitioner,	)	
v.	)	NO. 76-C-464
JERRY SUNDERLAND, Warden, State Penitentiary, Granite, Oklahoma, Respondent.	)	

O R D E R

The Court has for consideration a petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254 filed on behalf of a State prisoner presently confined in the Oklahoma State Reformatory, Granite, Oklahoma, as the result of the Judgments and convictions in the District Court of Oklahoma, Tulsa County, rendered upon his pleas of guilty to robbery with firearms in case No. CRF-75-813 and to shooting with intent to kill in case No. CRF-75-992. He was sentenced to seven years imprisonment in each case to run concurrently.

Petitioner filed a prior habeas corpus petition in this Court which was denied, without prejudice, for failure to exhaust adequate and available State remedies, by Order of this Court dated and filed December 30, 1975. Thereafter, the issue presently before this Court was presented to the District Court of Tulsa County, and after hearing an Order denying post-conviction relief was issued. The District Court's ruling was on appeal affirmed by the Oklahoma Court of Criminal Appeals in case No. PC-76-328, and Petitioner's State remedies have been exhausted.

Petitioner seeks release from custody and as grounds therefor alleges that his rights guaranteed by the Constitution of the United States were violated in the State proceeding in that:

> Juvenile hearings of an adversary, adjudicatory nature were held against the Petitioner on or about April 25, 1975, and May 6, 1975, in which witnesses against the Petitioner were presented and cross-examined, and these hearings could have resulted in a loss of Petitioner's liberty. Subsequently, Petitioner was tried, convicted and sentenced as an adult in the cases challenged before this Court in violation of Petitioner's right against double jeopardy.

The Court, having carefully studied the petition, response, transcripts and records of the State proceedings, and being fully advised in the premises, finds:

10 O.S.A. § 1101(a) provides, "The term 'child' means any person under the age of eighteen (18) years."

These proceedings were preliminary to an adjudicatory hearing, one in which the judicial determination was simply a finding of probable cause. It was not an adjudication that respondent had violated a criminal statute, although substantial evidence was introduced that he committed the offenses charged. The Court finds no double jeopardy violation as proscribed in Breed v. Jones, 421 U. S. 519 (1975) in the State proceedings against Arling Medina. The Oklahoma Court of Criminal Appeals has fully, adequately, and accurately considered Petitioner's propositions and Federal claims, and the record reveals that no further evidentiary hearing in this matter is necessary and the Petitioner is not entitled to relief. Putnam v. United States, 337 F.2d 313 (10th Cir. 1974); Maxwell v. Turner, 411 F.2d 805 (10th Cir. 1969); Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Arling Medina be and it is hereby denied and the case is dismissed.

Dated this 31st day of March, 1977, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31 1977 1:40

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HI-PERFORMANCE MARINE, INC., Plaintiff, vs. HARTFORD ACCIDENT AND INDEMNITY COMPANY, Defendant. HARTFORD ACCIDENT AND INDEMNITY COMPANY, Third Party Plaintiff, vs. GAIL WEST, Third Party Defendant.	)	No. 76 C364-B

STIPULATION OF DISMISSAL

COME NOW the parties hereto and in accordance with Rule 41(a) of the Federal Rules of Civil Procedures, 28 U.S.C., do hereby stipulate and agree to the voluntary dismissal with prejudice of this cause of action by the plaintiff.

Bill Wilkinson
CHAPEL, WILKINSON, RIGGS & ABNEY
Attorneys for plaintiff

John B. Hayes
Attorney for defendant, Hartford Accident and Indemnity Company

W. Keith Thomas
Attorney for Third Party Defendant, Gail West

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 31 1977 4.0.

Jack C. Silver, Clerk
U. S. DISTRICT COURT

HI-PERFORMANCE MARINE, INC.,

Plaintiff,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Defendant.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Third Party Plaintiff,

vs.

GAIL WEST,

Third Party Defendant.

No. 76 C364-B

DISMISSAL

COMES NOW the plaintiff and pursuant to Rule 41(a), Federal Rules of Civil Procedures, 28 U.S.C., and the stipulation of dismissal filed herein, does hereby dismiss with prejudice its cause of action herein.

CHAPEL, WILKINSON, RIGGS & ABNEY

By Bill Wilkinson
Bill V. Wilkinson
Attorneys for Plaintiff
1640 South Boston
Tulsa, Oklahoma 74119
587-3161

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PASKEL N. WADLEY, Petitioner,	)	
v.	)	NO. 76-C-484-B
DEAN TAYLOR, Sheriff of Pawnee County, Oklahoma, et al., Respondents.	)	

O R D E R

The Court has for consideration a petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254 filed on behalf of a State prisoner presently confined at the Vocational Technical Center, Stringtown, Oklahoma, under the custody and control of the Oklahoma Department of Corrections. Petitioner is incarcerated as the result of the Judgment and conviction in the District Court of Pawnee County, Pawnee, Oklahoma, in case No. CRF-74-7. The Defendant was charged with Murder in the Second Degree, and was convicted by jury of manslaughter in the first degree and sentenced to serve nineteen (19) years imprisonment. Petitioner asserts that he filed a direct appeal, and his conviction was affirmed by the Oklahoma Court of Criminal Appeals on April 16, 1976, and that he filed a petition for rehearing and the high Court of the State withdrew its original opinion and affirmed the Judgment as to guilt, but modified the sentence imposed by the jury by reducing the sentence to ten (10) years imprisonment. Wadley v. State, Okl. Cr., 553 P.2d 520 (1976).

Petitioner seeks release from custody and as grounds therefor alleges that his rights guaranteed by the Constitution of the United States to due process of law, to a fair and impartial trial, to confront and cross-examine witnesses against him, and to equal protection of the law, were violated in the State proceedings in that:

1. The trial Court admitted pretrial, prejudicial hearsay into evidence against Petitioner by witnesses concerning earlier and unrelated occurrences between the victim and Petitioner.

2. The appellate Court acknowledged prejudicial error by the trial Court, yet arbitrarily denied a new trial and modified sentence pursuant to 22 O.S.A. § 1066, which statute does not confer authority to cure substantial evidentiary error.

The Court has carefully reviewed the petition, the response, the record and transcripts of the State proceedings, and being fully advised in the premises, finds:

The first issue presented by Petitioner deals with trial errors regarding the erroneous admission of evidence which does not afford a basis for a § 2254 collateral attack. See, Alexander v. Daugherty, 286 F.2d 645 (10th Cir. 1961) cert. denied 366 U. S. 939; Schecter v. Waters, 199 F.2d 318 (10th Cir. 1952). The errors complained of were mere trial errors. Federal habeas corpus is not available to review errors in criminal cases. Pierce v. Page, 362 F.2d 534 (10th Cir. 1966). A review of the State proceedings shows that the Oklahoma Court of Criminal Appeals has fully, adequately, and accurately considered Petitioner's first proposition and Federal claims, and the record reveals that no further evidentiary hearing on this issue is necessary and the Petitioner is not entitled to relief thereon. Putnam v. United States, 337 F.2d 313 (10th Cir. 1974); Maxwell v. Turner, 411 F.2d 805 (10th Cir. 1969); Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975).

If the second issue were properly before this Court, the Court finds no inconsistency with fundamental principles of liberty and justice in the procedure applied by the Oklahoma Court of Criminal Appeals in this instance, and further does not find that the procedure offends the Federal Constitution. The authority of the Oklahoma Court of Criminal Appeals to modify Petitioner's sentence under the circumstances presented does not raise a Federal constitutional question on petition for writ of habeas corpus, rather, it is a matter of interpretation of State law and properly for the determination of the Oklahoma Courts. See, Wood v. Wilson, 385 F.Supp. 1055 (D.C.W.D.Okla. 1974). However, it is clear on the face of the petition that Petitioner's second issue challenges a State procedure pursuant to 22 O.S.A. § 1066. The constitutionality thereunder of the reduction of Petitioner's sentence by the appellate Court from 19 years to 10 years to cure any detriment suffered from prejudicial hearsay evidence admitted during trial should first be presented to the State Court through adequate and available State remedies pursuant to the post-conviction procedure act, 22 O.S.A. § 1080, et seq., or by habeas corpus in the State of Oklahoma pursuant to 12 O.S.A. § 1331, et seq. There is no principle in the realm of Federal habeas corpus better settled than that adequate and available State remedies must be exhausted, and probability of success is not the standard to determine whether a matter

should first be determined by the State Courts.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Paskel N. Wadley be and it is hereby denied and the case is dismissed.

Dated this 30th day of March, 1977, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED FILMS, INC., An Oklahoma Corporation,	)	
Plaintiff,	)	76-C-264-B
vs.	)	
UNITED ARTISTS CORPORATION, A Delaware Corporation, and	)	
TRANSAMERICA CORPORATION, A Delaware Corporation,	)	
Defendants.	)	

ORDER

The Court has for consideration the following Motions:

1. Motion to Dismiss filed by the defendants;

2. Motion to Remand filed by the plaintiff.

The Court has carefully considered the briefs filed by the parties, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

The Court will determine the Motion to Remand, being jurisdictional, ab initio.

The grounds asserted by plaintiff in its Motion to Remand are as follows:

> "To remand the above-entitled action to the District Court of Tulsa County, State of Oklahoma, on the ground that Transamerica Corporation, a Delaware corporation, who was named as a defendant and served with process in the state court proceedings in this action, has not joined with defendant United Artists Corporation, a Delaware corporation, in petitioning for removal of this action to this court, and the petition for removal alleged no reason why Transamerica Corporation, a Delaware Corporation, has not so joined therein, and further that Transamerica Corporation, a Delaware corporation, is not merely a nominal or formal party, but an indispensable party to this action if plaintiff is to receive the full measure of relief prayed for in its complaint, as more fully appears from the affidavit of Bill F. Blair, attached hereto as exhibit '1'."

The Court notes in the removal petition filed by the defendant, United Artists Corporation, (the sole removing defendant), there is no allegation of fraudulent joinder. The only reference to the other defendant is contained in paragraph 2 of the removal petition which states:

> "The other defendant named in the petition filed in the District Court of Tulsa County, Oklahoma, Transamerica Corporation, is also a Delaware corporation whose principal place of business is in New York City, New York."

The petition for removal was filed by the removing defendant on June 21, 1976. On July 7, 1976, the defendants filed a Motion to Dismiss, which read as follows:

> "The defendants move that this action be dismissed because the petition fails to state a claim upon which relief can be granted."

There is no allegation of lack of jurisdiction over the non-removing defendant, Transamerica Corporation.

Removability of an action is to be determined as of the time the removal petition is filed and as of the time of the commencement of the state action.

In Petttit v. Arkansas Louisiana Gas Company (USDC, ED Okl, 1974) 377 F.Supp. 108, it was said on a sua sponte removal.

> "The right to removal is statutory and before a party may avail himself ofsuch right, he must comply with the statutory provisions. Edwards v. E. I. DuPont DeNemours & Co., 183 F.2d 165 (Fifth Cir. 1950). Among the statutory requirements to be complied with, is that all defendants must join in the removal. This Court so held in the case of Dyer v. Burns, 257 F.Supp. 268 (W.D.Okl.1966) ***."

The Court went on to say:

> "***Nor was removal based on an alleged fraudulent joinder ***, or that Texas is merely a nominal party Defendant ***.
>
> "Good practice requires that a Petition for Removal state the reason why all defendants are not joining in the removal. In Futurama Import Corp. v. Kaysons International of Miami, Inc., 304 F.Supp. 999 (D.Puerto Rico 1969) the Court stated:
>
> "'Notwithstanding this fact there is no allegation or reason given in the removal petition which would explain why the other two defendants were not included therein. In

discussing the contents of a petition for removal as required by 28 U.S.C. §1446 Moore comments:

> "'It is not enough that a valid basis for removal exists. The ground(s) must be set out in the removal petition; and the petition should not leave any issue, as to the prima facie right to remove, at large. Thus where the suit involved multiple defendants and one or more of the defendants does not join in the petition, better practice dictates that the petition expressly indicate why, e.g., that he is a nominal party or was not served at the time of filing the petition. LA Moore's Federal Practice Sec. 0.-168(3-4) pp. 1201, 1202, Second Edition."

This Court construes the removal provisions strictly and requires strict adherence thereto.

After reviewing the entire file, the Court finds that compliance has not been had in the removal petition, and this Court, had not the plaintiff filed a Motion to Remand, would have remanded this cause of action and complaint sua sponte.

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Remand be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the District Court for Tulsa County, Oklahoma.

ENTERED this 30th day of March, 1977.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

TEXACO INC., a Delaware Corporation,

Plaintiff,

vs

HELEN JEAN McCOY, Individually and as Administratrix of the Estate of Richard McCoy, deceased, et al,

Defendants.

No. 76-C-536(B)

ORDER FOR SUMMARY JUDGMENT AND JUDGMENT

This cause comes on to be heard on the motion of the Plaintiff Texaco Inc. for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action and being fully advised and having found that there is no genuine issue of fact to be submitted to the Trial Court, and having concluded that the Plaintiff Texaco is entitled to judgment, as a matter of law, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is in all respects granted; and it is further

ORDERED, that this Court, pursuant to 28 U.S.C., §1335, has jurisdiction of the subject matter of this action, which is to say, the sum of $7,839.34, representing accruals in cash dividends to 398 shares of common stock in the said Texaco Inc. and jurisdiction to determine the disposition of the said 398 shares of common stock, and being that property described and itemized in the Exhibit "A" appended to the Answer of Plaintiff Texaco to Cross Complaint of the Defendant Helen Jean McCoy, Individually and as Administratrix of the Estate of Richard McCoy, deceased, on file herein; and that this Court has jurisdiction over the persons of the Defendants herein, and each of them, and to determine their respective rights, each as against the others, and in respect to the Plaintiff Texaco Inc., in and to said property.

The Court finds that the aforesaid 398 shares of common stock and the sum of $7,839.84 thereto accruing as of the time of the commencement of this action are property of the Estate of Richard McCoy, deceased; that the said Richard McCoy died intestate, a resident of Tulsa County, State of Oklahoma, on or about July 24, 1963 survived by his brothers and sisters Calvin McCoy, John Harper, George Harper, Charlcy Frazier, Mamie McCoy Mathews, Virginia Smith, Bertie Crenshaw and Rose Muck as his only heirs at law; that thereafter the said George Harper died intestate, survived by Allie Harper, his widow, and by Johnny Mack Harper, Georgie Mae Taylor, Calvin Harper, Verna Williams, Rose Harper Thomas, Henry Earl Harper, George Lee Harper, Willie Mae Dantzler, Altee Harris, Lucy Gilstrap and Nathaniel Harper as his only heirs at law; and that the said Nathaniel Harper thereafter died intestate, he being survived by Nathaniel Harper, Jr. as his sole heir at law; and all of the aforesaid heirs, immediate and remote, and now living, of the said Richard McCoy have been joined as parties defendant in this action and are subject to the jurisdiction and judgment of this Court.

The Court further finds that following the death of the said Richard McCoy, Helen Jean McCoy, Defendant herein, was on her Petition to the County Court of Tulsa County, Oklahoma, in proceeding now styled In the Matter of the Estate of Richard McCoy, deceased, Probate No. 38081, District Court, Tulsa County, by that Court appointed Administratrix for the Estate of Richard McCoy, that said cause is yet pending, and that Letters of Administration issued therein to the said Helen Jean McCoy have to this time not been revoked.

The Court further finds that upon the application of the brother and sister of the deceased Richard McCoy, and on the same day, August 9, 1963, the Superior Court of Contra Costa County, State of California in proceeding in probate styled In the Matter of the Estate of Richard McCoy, deceased, No. 29661, appointed George W. Harper (now deceased) and the Defendant Charlcy Frazier Co-Administrators for the Estate, and that Letters of Administration then issued by the California Court in respect to the said Charlcy Frazier have not been revoked.

The Court finds that as of the time of the death of the aforesaid Richard McCoy he was the owner of 190 shares of the common stock of the said Texaco Inc., and that the certificates evidencing the same were in the possession, and continue to be in the possession, of the said Helen Jean McCoy; that there has since accrued to the account of the said Estate, as stock dividends and in consequence of a stock split, an additional 208 shares of said common stock presently held by the Plaintiff Texaco Inc.; and that there has accrued unto the entire 398 shares of common stock, and as of the time of the commencement of this action, cash dividends in the amount of $7,839.84, all as set forth and itemized in the Exhibit "A" attached to the Answer of the Plaintiff Texaco Inc.

The Court further finds that subsequent to the appointment of Helen Jean McCoy as Administratrix for said Estate by the Oklahoma Court, and subsequent to the appointment of Charlcy Frazier as Administratrix for said Estate by the California Court, both on the same day, August 9, 1963, and until the commencement of this action, there has been a continuing controversy as between these Defendants as to their right, each as against the other, to the possession and control of said common stock and accrued cash dividends, and that the conflict between them presented an issue of authority and jurisdiction which could not be resolved, without their agreement, by the Plaintiff Texaco Inc., and that Plaintiff has, by its institution of this action, properly invoked its remedy of interpleader as provided by 28 U.S.C. §1335.

The Court, upon consideration, finds, and adjudges, that Richard McCoy having died a resident of the County of Tulsa in the State of Oklahoma, Helen Jean McCoy, as Administratrix in proceeding to administer his estate now pending in the District Court of said County, has the right and authority, prior and superior to the claim of the said Charlcy Frazier as Administratrix under appointment of the California Court, and for the purpose of administering the Estate of the said Richard McCoy, deceased, to the possession and control of that property consisting of 398 shares of common stock of Texaco Inc. and accrued cash dividends in the sum of $7,839.84, which is the subject of this action, and this Court should and does hereby ORDER said Plaintiff to deliver and to assign over to the said Helen Jean McCoy, in her capacity as Administratrix for the said Estate, to be administered upon as assets of the Estate, the said 208 shares of common stock now in the possession of the said Plaintiff, and to transfer of record unto the said Helen Jean McCoy, as Administratrix, the said 190 shares of common stock, the certificates for which are now in the possession of the said Helen Jean McCoy, and to pay over unto the said Helen Jean McCoy, as Administratrix (and subject only to that deduction for costs hereinafter provided), the said sum of $7,839.84 accrued as cash dividends as of the time of the commencement of this action.

The Court hereby ORDERS the said Defendant Helen Jean McCoy, as Administratrix, to make full accounting to the District Court of Tulsa County, Oklahoma for that property delivered unto her and confirmed in her, as herein provided, that the same may be duly administered upon and that distribution thereof may be made unto the parties entitled thereto according to the applicable laws of succession, subject only to the incidents and burdens of administration.

The Court finds that the Plaintiff Texaco Inc. has waived its claim to an attorney's fee for its prosecution of this action and that the Defendant Helen Jean McCoy, Individually and as Administratrix, has waived her claim to interest upon that debt owing her by Texaco Inc. as cash dividends accrued as of the commencement of this action, that these parties have so stipulated and their agreement is hereby adopted by this Court, and it is so ORDERED.

The Court finds that the costs of this action amounting to the sum of $ 270.90 should be paid and discharged by the Plaintiff Texaco Inc. from that fund in the sum of $7,839.84 held as aforesaid by the Plaintiff as accrued cash dividends, and that the said Plaintiff should be permitted to deduct that sum in discharge of such costs from its payment of said fund to Helen Jean McCoy, Administratrix, as herein provided, and it is so ORDERED.

The Court ORDERS AND DECREES that from and after the date of this judgment Plaintiff Texaco Inc. should be, and is, absolved and discharged of and from all liability to the Defendants, and all and each of them, in respect to that property which is the subject of this action, and that the Bond in the amount of $8,000 filed with this Court by said Plaintiff upon its commencement of this action be and the same is hereby vacated and held for naught.

It is further ORDERED AND DECREED that the Order Restraining Institution or Prosecution of Proceedings issued by this Court on October 28, 1976 restraining the Defendants herein, and each of them, from instituting or prosecuting any action in respect to that property which is the subject of this action, be and the same is hereby made permanent and binding as against the Defendants and each of them; excepting only that the Defendant Helen Jean McCoy, as Administratrix of the Estate of Richard McCoy, deceased, in the aforesaid action to administer his Estate now pending in the District Court of Tulsa County, Oklahoma should be and is hereby permitted to proceed with that action to the end the District Court of Tulsa County, Oklahoma may ultimately determine all rights to said property as among the parties hereto and decree the distribution thereof in the manner required by law.

Dated this 29th day of March, 1977.

Allen E. Barrow
U.S. District Judge

APPROVED:

James H. Werner
James H. Werner, Attorney for
Defendant Helen Jean McCoy

APPROVED:

Philip R. Wimbish
Philip R. Wimbish
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CLARENCE YARBROUGH and
GOLDEN Y RANCH, INC.,
a Texas Corporation,

Plaintiffs,

vs.

WALLACE BARBEE, BAR-B RANCH, INC., a Foreign Corporation, APPALOOSA HORSE CLUB, INC., an Oregon Corporation, GEORGE B. HATLEY, L. K. RUTHERFORD, and JERRY NUNNELEY,

Defendants.

No. 76-C-550-C

FILED

MAR 29 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The above-styled action was originally filed in the District Court of Tulsa County, State of Oklahoma, on October 1, 1976. On October 29, 1976, defendant Appaloosa Horse Club, Inc., and George B. Hatley filed a Petition for Removal. In their Petition, defendants Appaloosa Horse Club, Inc. and George B. Hatley assert that although defendant L. K. Rutherford and Wallace Barbee are citizens of the State of Oklahoma, the causes of action alleged in regard to the defendants seeking removal are separate and independent of the causes of action alleged in regard to the Oklahoma defendants. Removing defendants assert removal is authorized pursuant to 28 U.S.C. § 1441.

Plaintiffs allege in their Petition that in 1973 plaintiff Clarence Yarbrough purchased a horse named "Sequins Plaudit" from defendants Wallace Barbee and Bar-B Ranch, Inc. Sequins Plaudit was registered as being from a stallion known as "King Plaudit" out of a mare known as "Three Slips", both sire and dam being then owned by Bar-B Ranch, Inc. Plaintiff alleges that in 1975, defendant L. K. Rutherford caused a protest to the registration of Sequins Plaudit to be filed with the defendant Appaloosa Horse

Club, Inc., and that Rutherford asserted that Sequins Plaudit was really a mare named "Crickett Miss". Plaintiffs allege that thereafter on June 25, 1976 the Appaloosa Horse Club, Inc. conducted a Board of Directors meeting at which meeting they purported to determine the parentage of Sequins Plaudit, but plaintiff asserts the meeting was not in accordance with the rules and regulations of the Club. On April 13, 1975 plaintiff states that defendant Rutherford, the Appaloosa Horse Club, Inc., and Clarence Yarbrough entered into a settlement agreement which provided that Sequins Plaudit's registration would be changed only if both King Plaudit and Three Slips were eliminated as possible sire and dam of Sequins Plaudit. Thereafter, the Appaloosa Horse Club, Inc. appointed defendant George B. Hatley to perform the testing.

Plaintiff's Petition consists of eight separately enumerated causes of action. Plaintiffs state in their Brief in Support of Motion to Remand that the eight causes of action arise out of one wrong, which is "either that the mare known as Sequins Plaudit was originally misregistered or was properly registered." In summary, plaintiff's causes of action assert: (1) that the Appaloosa Horse Club should be enjoined until the registration of Sequins Plaudit is judicially determined; (2) that defendants Wallace Barbee and Bar-B Ranch, Inc. made fraudulent representations that the mare in question was in fact Sequins Plaudit; (3) that Wallace Barbee and Bar-B Ranch, Inc. acted fraudulently in causing the wrong mare to be blood tested as the purported dam of Sequins Plaudit resulting in loss of registration due to action of the Appaloosa Horse Club; (4) that L. K. Rutherford wrongfully filed a protest of the registration with the Appaloosa Horse Club; (5) that the Appaloosa Horse Club negligently conducted the inspection and blood testing of the purported sire and dam of Sequins Plaudit; (6) that George Hatley, acting as the representative of Appaloosa Horse Club wrongfully

or negligently hindered the rightful determination of the protest filed by L. K. Rutherford; (7) that Jerry Nunneley and L. K. Rutherford conspired to wrongfully cause a protest to the registration of Sequins Plaudit to be filed; and (8) that Jerry Nunneley fraudulently represented a horse to be Sequins Plaudit.

Title 28 U.S.C. 1441(c) provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

One judge, after reviewing the first twelve years of decisions under this statute, declared "it is not an exaggeration to say that at least on the surface the field luxuriates in a riotous uncertainty." This statement appears to remain accurately descriptive.

In American Fire & Casualty Company v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951) the Supreme Court stated that one purpose of Congress in adopting the "separate and independent claim or cause of action" test for removability by § 1441(c) was to limit removal from state courts. The Court went on to state:

> "A separatable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. . . . Congress has authorized removal now under § 1441(c) only when there is a separate and independent claim or cause of action. . . . The addition of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal."

The Court thereafter concluded that the case presented no separate and independent claim or cause of action because there was a single wrong to the plaintiff, for which relief was sought, "arising from an interlocked series of transactions."

In Snow v. Powell, 189 F.2d 172 (10th Cir. 1951) the Tenth Circuit, in citing American Fire and Casualty, pointed out that the critical words "separate" and "independent" are used in the conjunctive and should be given their full significance in order to carry out the intent and purpose of Congress to limit removals and to simplify the determination of removability. The Court thereafter stated:

> "The word 'separate' means distinct; apart from; not united or associated. The word 'independent' means not resting on something else for support; self-sustaining; not contingent or conditioned."

In the case at bar the removing petitioners point out that the causes of action pleaded against the nonremoving defendants all contain allegations of fraud while the causes of action against the removing petitioners demand equitable relief and allege negligence. The fact that the causes of action alleged are based on different legal theories of recovery is not, however, determinative of the issue of whether the causes of action are separate and independent. For example, in Winton v. Moore, 288 F.Supp. 470 (N.D.Okla. 1968) plaintiff alleged causes of action for breach of fiduciary duty and breach of contract; in Gray v. New Mexico Military Institute, 249 F.2d 28 (10th Cir. 1957) plaintiff alleged causes of action based upon negligence and breach of contract; and in Snow v. Powell, supra, the causes of action were based upon assault and upon negligence. In each of the above-cited cases the Court held that a separate and independent claim or cause of action was not alleged.

In Winton v. Moore, supra, the Court noted that although the plaintiff stated a cause of action in tort against one defendant and another on the basis of contract against the other defendant, only a single recovery was sought. Similarly, in the case at bar plaintiffs seek recovery from the removing and nonremoving defendants for

> "(a) consequential damage in the sum of $16,000.00 attorney fees and expenses to defend the registration of Sequins Plaudit

(b) Actual damage to the reputation of Clarence Yarbrough and Golden Y Ranch, Inc. in the sum of $20,000.00 each.
(c) Actual damage in devaluation of the horse known as Sequins Plaudit No. T-180, 840 from a value of $55,000.00 to a value of $15,000.00."

Although plaintiffs also seek differing relief in addition to the above, the basic recovery sought is the same as to all defendants. In American Fire & Casualty Co. v. Finn, supra, the Supreme Court, quoting from Baltimore v. Phillips, 274 U.S. 316 (1927) stated: "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of negligence or to a combination of some or all of them." In Gallagher v. Continental Insurance Company, 502 F.2d 827 (10th Cir. 1974) the Court considered the recovery sought in holding that separate and independent causes of action had been alleged since two wrongs were alleged and the complaint sought two different recoveries.

The Court in Gray v. New Mexico Military Institute, supra, considered the fact that the recovery on one cause of action depended for its support on the establishment of the other cause of action. In the case at bar, the plaintiffs are attempting to ascertain whether Sequins Plaudit was or was not properly registered and determination of the causes of action alleged as to the removing defendants could form a basis for the determination of the causes of action alleged as to the nonremoving defendants.

It is the determination of the Court that the relief sought arises from an interlocked series of transactions and that the causes of action alleged as to the removing defendants are not separate and independent claims or causes of action. This action is, therefore, hereby remanded to the District Court of Tulsa County, Oklahoma.

It is so Ordered this 29th day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DAVID E. KELLEY, Plaintiff,

vs.

FLORAFAX, INTERNATIONAL, INC., Defendant.

No. 76-C-189-C

ORDER SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT

NOW, on this 22nd day of March, 1977, this cause having come on to be heard on motion of the Defendant, FLORAFAX INTERNATIONAL, INC., for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Plaintiff, DAVID E. KELLEY, being present by his attorneys, BOOTH & JAY and STEPHEN M. BOOTH, and the Defendant being present by its attorneys, DOERNER, STUART, SAUNDERS, DANIEL & LANGENKAMP and ROBERT F. BIOLCHINI and STEVEN G. COOPER,; and

The Court, having considered the pleadings in the action, the affidavit of ALBIN M. JOHNSON, dated August 17, 1976 in support of the motion, the affidavit of BOB E. SURRETT, dated September 3, 1976 in support of the motion, the affidavit of DAVID E. KELLEY, dated November 1, 1976 in opposition thereto, the deposition of DAVID E. KELLEY, dated July 12, 1976 and all exhibits attached thereto, and having heard counsel's oral arguments and having found that there is no dispute or genuine issue of fact to be submitted to the trial court, and having concluded that Defendant is entitled to judgment as a matter of law, it is hereby

ORDERED that the defendant's motion for summary judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED that judgment be entered herein in the Defendant's favor dismissing the action with costs and disbursements to be taxed by the Clerk, in favor of the Defendant and against the Plaintiff.

Dated this 29th day of March, 1977.

/S/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT B. DUNCAN, III, Petitioner,

v.

PEOPLE OF THE STATE OF OKLAHOMA, ET AL., Respondents.

NO. 76-C-269-B

ORDER

The Court has for consideration the pro se, in forma pauperis petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Herbert B. Duncan, III. The petition was filed in the United States District Court for the Western District of Oklahoma and transferred to this Northern District of Oklahoma pursuant to 28 U.S.C. § 2241(d).

Petitioner is a prisoner in the Lexington Regional Treatment Center, Lexington, Oklahoma, pursuant to conviction upon his plea of guilty to grand larceny in the District Court of Tulsa County, Tulsa, Oklahoma, case No. CR. 74-3011, and sentence on May 1, 1975, to a term of five (5) years imprisonment. He did not take a direct appeal from his conviction and sentence. Petitioner did file an application for post-conviction relief pursuant to 22 O.S.Supp. 1974 § 1080-8 which was denied by Order, dated and filed March 11, 1976, of the District Court of Tulsa County, State of Oklahoma. Petitioner asserts that he mailed, bearing date of March 19, 1976, a notice of intent to appeal the denial of his post-conviction application to the Tulsa County District Court and to the Oklahoma Court of Criminal Appeals. He then mailed, dated April 6, 1976, a request for extension of time to file brief on post-conviction appeal. This April 6, 1976, letter was returned to him from the Oklahoma Court of Criminal Appeals with the notation, "In order to assist you in the above mentioned matter we will need the appeal number assigned your case." He responded by letter dated April 16, 1976, informing the State appellate Court that he had mailed notice of appeal to them and the Tulsa County District Court on March 19, 1976, and had not been assigned an appeal number. The State appellate Court responded by note dated April 21, 1976, returning to him a copy of the Order of the District Court denying post-conviction relief and stating that no petition or application on the matter had been received and appeal on that date would be out of time. This letter was, it appears, received by the Petitioner at Lexington on April 23, 1976, with postage due thereon. This Court has been

troubled by this exchange of correspondence as the Court feels that the Petitioner should have received more explicit assistance in his pro se attempt to appeal. However, it is not for this Federal Court to dictate procedures in the State Courts, and a careful review of the correspondence shows no gross negligence or disregard for the Petitioner on the part of the State Court personnel, especially in light of the appellate Rule set out below.

Petitioner demands his release from custody and as grounds therefor asserts that his right to due process of law guaranteed by the Constitution of the United States has been violated in that:

1. He is confined by an illegal sentence because his plea bargain was not kept; and

2. He has been denied his right to appeal.

The Court has carefully reviewed the petition, attachments thereto, response, and "Petitioner's Demurrer to Attorney General's Response," and being fully advised in the premises, the Court finds:

22 O.S.Supp. 1975 Ch. 18--App., Sec. IV, Rule 4.2 C., provides that any party desiring to appeal from the final Judgment of the District Court must file a Petition in Error, with a copy of the Judgment appealed from attached, with the Clerk of the Court of Criminal Appeals within 30 days from the date of the final Judgment of the District Court. The brief, if there is to be one, should be filed within the same period of time. However, the Rule further specifically provides, "Failure to file such Petition in Error, with or without brief, within the time provided, shall deprive this Court [the Oklahoma Court of Criminal Appeals] from considering said appeal." Pursuant to this Rule, it was mandatory that Petitioner file his Petition in Error, with or without brief, no later than April 12, 1976, in the Oklahoma Court of Criminal Appeals. This the Petitioner did not do. Therefor, by his own failure, his State remedies have not been exhausted by a ruling of the high Court of the State of Oklahoma on his allegations, and his petition to the Federal Court is premature. There is no principle in the realm of Federal habeas corpus better settled than that adequate and available State remedies must be exhausted.

Further, the Court finds that there are adequate and available State remedies open to the Petitioner. He may file a second petition pursuant

to the post-conviction procedure act, 22 O.S.A. § 1080, et seq., or he may file a habeas corpus action in the State of Oklahoma pursuant to 12 O.S.A. § 1331, et seq. There is no necessity for an evidentiary hearing in the matter, and until he has exhausted the State remedies which are adequate, open and available to him, his petition before this Court should be denied and the case dismissed without prejudice to his refiling a later petition, if necessary, after his State remedies are exhausted.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Herbert B. Duncan, III, be and it is hereby denied and the case is dismissed without prejudice.

Dated this 29th day of March, 1977, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOHNNY RAY SMITH, Petitioner,

v.

STATE OF OKLAHOMA, Respondent.

NO. 76-C-513-B

O R D E R

The Court has for consideration a pro se, in forma pauperis petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254, filed by State prisoner Johnny Ray Smith. He is presently confined in the Oklahoma State Penitentiary, McAlester, Oklahoma, as a result of the Judgment and conviction by jury of murder second degree in case No. CRF-75-406 in the District Court of Tulsa County, State of Oklahoma. Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals presenting the same issues, among others, that he alleges in this Court, and his conviction was affirmed. Smith v. State, Okl. Cr., 550 P.2d 946 (1976). The appeals Court did remand the case to the District Court for resentencing since the original sentence did not conform with the statutory provisions of 21 O.S.Supp. 1975 § 701.4. Pursuant to the corrected sentence, Petitioner's imprisonment is for an indeterminate period of ten years to life; and Petitioner's State remedies have been exhausted.

Petitioner seeks release from custody and as grounds therefor alleges that his rights to due process of law as guaranteed by the Constitution of the United States were violated in the State proceedings in that:

1. The trial Court erred when jurors were called in and coerced into rushing a decision of guilty;

2. Prejudicial and inflamatory remarks were made by the prosecuting attorney in his closing argument resulting in Petitioner's being denied a fair trial; and

3. The accumulation of errors and irregularities in the trial of Petitioner, when considered as a whole, deprived Petitioner of a fair and impartial trial.

The Court being fully advised in the premises, having carefully reviewed the petition, response, and transcripts of the State proceedings, finds that the allegations of the petitioner are without merit and his petition should be denied.

6

The trial Court at 6:15 p.m., after four hours of jury deliberation, stated to the jurors that they might deliberate another fifteen minutes and if no verdict was reached arrangements would be made to sequester and lodge the jury. The Court further stated to the jurors, "I would hope that you are able to make an agreement. In recognizing, of course, that without knowing which way you stand, that those in the minority recognize the rationale as approached by the majority." These proceedings, as reflected in the transcript at pages 280 to 287, do not amount to coercion and do not give rise to a constitutional violation to substantiate granting a writ of habeas corpus.

Reversal of a conviction due to extravagant jury argument by the prosecutor is proper only if there is prejudice or if the case is otherwise so weak that an assumption of no prejudice is unwarranted. Bryant v. Caldwell, 484 F.2d 65 (5th Cir. 1973), reh. den. 486 F.2d 1403, cert. den. 415 U. S. 981 (1974). The closing argument of the prosecutor appears in the transcript at pages 237 through 255. This argument is not a model for emulation, but no manifest prejudice to the Defendant, Petitioner before this Court, is found; and the proof of Petitioner's guilt is most substantial. Improper remarks by the prosecutor do not form the basis for overturning the conviction of a State prisoner in a habeas corpus proceeding where the remarks do not result in the deprivation of a fundamentally fair trial. Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966), cert. den. 385 U. S. 905; Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

Petitioner's third allegation that the accumulation of errors and irregularities in the trial, considered as a whole, deprived him of a fair and impartion trial must fail. His first two allegations have been found to be without merit, and that same finding must apply to the accumulation thereof as claimed in the third allegation.

The Oklahoma Court of Criminal Appeals has fully, adequately, and accurately considered Petitioner's propositions and Federal claims, and the record reveals that no further evidentiary hearing in this matter is necessary and the Petitioner is not entitled to relief. Putnam v. United States, 337 F.2d 313 (10th Cir. 1974); Maxwell v. Turner, 411 F.2d 805

(10th Cir. 1969); Cranford v. Rodriguez, 512 F.2d 860 (10th Cir. 1975).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Johnny Ray Smith be and it is hereby denied and the case is dismissed.

Dated this 28th day of March, 1977, at Tulsa, Oklahoma.

Allen E. Barrow

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. COTNER, Petitioner,

v.

STATE OF OKLAHOMA, ET AL., Respondents.

NO. 77-C-7

O R D E R

The Court, after repeated readings of the instrument and attachments filed pro se, in forma pauperis, by the Petitioner, Robert E. Cotner, determines that Petitioner is a prisoner in the Oklahoma State Penitentiary pursuant to conviction by jury of second degree rape in violation of 21 O.S.A. § 1111 in the Tulsa County District Court, State of Oklahoma, in case No. CRF-76-1099.

Petitioner's contention is apparently that he was denied his right to appeal the conviction because the bail set for appeal was too high and he could not make it. It appears that Petitioner filed a habeas corpus or mandamus petition, H-76-810, with the Oklahoma Court of Criminal Appeals asserting this issue, which has been denied. He further contends that he is being deprived of his right to counsel in that the State Court will not appoint counsel to represent him in proposed post-conviction proceedings pursuant to 22 O.S.A. § 1080, et seq., or 12 O.S.A. § 1331, et seq.

The Court finds that a State prisoner has no absolute Federal constitutional right to bail pending appeal and generally the issue of the amount of that bail or the denial of bail is not an available ground for seeking habeas corpus relief. Hamilton v. State of New Mexico, 479 F.2d 343 (10th Cir. 1973). Further, the issue is moot since Petitioner admits that he withdrew his direct appeal. Also, a State prisoner has no Federal constitutional right to the appointment of counsel in post-conviction proceedings. Plaskett v. Page, 439 F.2d 770 (10th Cir. 1971). The numerous remaining allegations presented by Petitioner, by his own admission, clearly have not been presented to the high Court of the State of Oklahoma for ruling; and they are thereby premature in this Court. There is no principle in the realm of Federal habeas corpus better settled than that adequate and available State remedies must be exhausted. The petition for writ of habeas corpus of Robert E. Cotner is without merit on

the issue of excessive bail on appeal and the denial of counsel for post-conviction proceedings, and on all remaining issues the petition is premature for failure to exhaust adequate and available State remedies. The petition should at this time be denied and dismissed, with permission to refile, if necessary, after the State remedies have been exhausted.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Robert E. Cotner be and it is hereby denied and the case is dismissed without prejudice.

Dated this 28th day of March, 1977, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

PARMAC, INC., a Delaware Corporation,

Plaintiff,

vs.

AETNA CASUALTY AND SURETY COMPANY, a Connecticut Corporation,

Defendant.

No. 76-C-458-B

FILED

MAR 28 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON this 28th day of March, 1977, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

Allen E. Barrow
JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

WILLIAM S. HALL

Attorney for the Plaintiff

RICHARD D. WAGNER

Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PAUL WILLIAM POLIN,	)	
	)	
Plaintiff,	)	
	)	75-C-569-B
vs.	)	
	)	
THE INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

JUDGMENT

Based on the Findings of Fact and Conclusions of Law filed this date, wherein the Court sustained the defendant's Motion for Summary Judgment,

IT IS ORDERED that Judgment be entered in favor of the defendant and against the plaintiff.

ENTERED this 28th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PAUL WILLIAM POLIN,	)	
	)	
Plaintiff,	)	75-C-569-B
	)	
vs.	)	
	)	
THE INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The Court has for consideration the Motion for Summary Judgment filed by the defendant, The Internal Revenue Service, the briefs in support and opposition thereto; the various affidavits and exhibits submitted by the parties, and, having carefully perused the entire file, and, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, when he commenced the instant litigation, was represented by retained counsel, but said counsel has been allowed to withdraw, and plaintiff, having been granted various extension of time to secure counsel, now appears in this action pro se.

2. Plaintiff has filed a complaint setting up three separate causes of action, but all appear to arise out of the same set of circumstances and are all related.

3. Plaintiff filed a timely income tax return for the calendar year 1971, reporting a tax liability, but tendering no money at the time said return was filed.

4. The assessment date by the Internal Revenue Service was dated May 29, 1972.

5. Prior to paying said assessment plaintiff filed an amended income tax return (Form 1040X), dated October 16, 1972. This return reflected that plaintiff had no tax liability for the year 1971. The non-liability was based on an award of $38,000 received in settlement of litigation and paid during the year 1971.

6. On October 25, 1974, the Internal Revenue Service informed plaintiff by letter of their position, i.e.:

> "Your Form 1040X filed October 16, 1972, constitues a request for abatement of the liability shown on your return for the year 1971. You have been given your administrative appeal through this office and the Appellate Branch Office and it has been concluded that your request for abatement must be denied.
>
> "Revenue Officer Jerry Mitchell of our Tulsa Office will be contacting you in the next few days to discuss the payment of this liability.
>
> "After payment of the liability, you could further pursue an appeal by filing a claim for refund. When this is denied, a suit in Federal District Court could be filed."

This letter was signed by Albert F. Schrempp for Clyde L. Bickerstaff, District Director.

7. The amount of tax assessed by the Internal Revenue Service was $3,206.12.

8. An overpayment for the tax year 1973 was credited to the assessment on April 15, 1974, and the balance of the payment was made by two installments received from plaintiff on January 2, 1975, and February 14, 1975.

9. Plaintiff did not file a formal claim for refund.

10. On November 19, 1974, plaintiff sent a letter to the Internal Revenue Service Office in Oklahoma City. The request contained in said letter is as follows:

> "Pursuant to our telephone conversation of this date, the purpose of this letter is to reaffirm my formal request that I be given the opportunity to review all information including but not limited to correspondence, communications, directives, investigations and tax returns and opinions that you currently have in your files or that may be in the files of any other office and that may be accessible or available to you or your subordinates pursuant to Title 5, U.S.C. section 552 commonly known

as the Freedom Information Act.

"I further request the availability of copies of your policy and administrative staff manuals and instructions to members of your staff concerning my case or any similar cases involving the same issues arising out of the same disputes. Such information to be provided on November 26, 1974. "

11. On January 2, 1975, the Internal Revenue Service responded to said letter as follows:;

"This is in response to your letter dated November 19, 1974, to Mr. Wendall Knobbe, Chief, Field Collection Branch in Oklahoma City, Oklahoma, in which you requested documents under the freedom of Information Act. Your letter has been forwarded to this office for consideration and response.

"From the general descriptions in your letter, we are unable to ascertain precisely what documents or information you are requesting. We recommend that you contact the Internal Revenue Service in Oklahoma for assistance in identifying the documents you want. In this way, we should be able to better serve you by providing you with these documents requested that are available under the Freedom of Information Act, 5 U.S.C. 552.

"If we can be of any further assistance, please let us know."

12. On February 18, 1975, the following letter was directed to Mr. Polin, the plaintiff in the instant case:

"This is in further response to your letter dated November 19, 1974, to Mr. Wendell Knobbe of our Oklahoma City Office, in which you requested various documents under the Freedom of Information Act.

"We are enclosing an edited version of those records pertaining to your Federal Income tax for the year 1971. Also enclosed is a Freedom of Information Invoice to cover the cost of photocopying.

"Portions of the file have been deleted because we consider them to be exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 in accordance with subsection (b)(2) as related solely to the internal personnel rules and practices of an agency; subsection (b)(3) as specifically exempted from disclosure by statute; subsection (b)(5) as inter-agency or intra-agency memorandums of letters which would not be available by law to a party other than an agency in litigation with the agency; (b)(6) as personnel and medical files and similar disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (b)(7) as investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. We assert these exemptions and deny, in part, your request.

"At any time within 30 days after the date of this letter, you may file an appeal of our determination to the Commissioner of Internal Revenue. The appeal must be in the form of a statement signed by the appellant and mailed to the Commissioner of Internal Revenue, ***."

13. On February 19, 1975, plaintiff wrote a letter to Mr. Clyde Bickerstaff in Oklahoma City, which stated in pertinent part:

"On 2 previous occasions I have requested of your subordinate, Mr. Wendell Knobbe, Information and data pursuant to Title 5, U.S.C. section 552 et seq. as amended commonly known as the Freedom of Information Act. The responses to my requests have been arbitrary, capricious and dilatory.

"I am therefore making one final request pursuant to the Freedom of Information Act to provide me with all information including but not limited to correspondence, communications, directives, investigative data, tax returns, internal memos, staff opinions and any other data that is currently in my file that relates to myself or my wife under taxpayer #358-14-0279, that may be in the district office, regional office or in any other offices of the Internal Revenue Service that may be accessible to you, your subordinates or your superiors.

"I further request that you make available to me copies of your policy and administrative staff manuals as well as instructions that may have been given to members of your staff or the appellate staff concerning my case file and the disputed 1040X and copies of similar directives that may have been issued involving disputes of similar issues.

"Said information is to be provided me within 10 working days from the receipt of this letter ***."

14. On March 12, 1975 the following letter was written to plaintiff:

"This is in response to your letter dated February 19, 1975, in which you requested once again the documents you had previously requested.

"Our record show that we responded to your earlier requests in our letter dated February 18, 1975, copy of which is enclosed.

"If for any reason you have not received our earlier response, please let us know."

15. On March 10, 1975, plaintiff wrote the following letter to Mr. Donald C. Alexander, Commissioner, Internal Revenue Service, Washington, D.C.

> "The purpose of this letter is to be considered a statement of appeal as set forth in Title 5 U.S.C. 552 et seq. as amended commonly known as the Freedom of Information Act.
>
> "I am asking you to consider the numerous and sundry requests that I have made to Mr. Wendell Knobbe, Chief Field Collection Branch, Oklahoma City, Oklahoma on November 19, 1974, December 16, 1974, by Certified Mail, Return Receipt Requested and on January 2, 1975 in the presence of Mr. John Choate and Mr. Jerry Mitchell and an additional request was made to Jerry Mitchell on January 16, 1975 and a final request was made to Mr. Clyde Bickerstaff, District Director, Internal Revenue Service on February 19, 1975. Copy of same enclosed herewith.
>
> "The purpose of my original request for the information was to determine to what extent there was negligent and/or arbitrary, and capricious handling of the original 1040X return filed with the Internal Revenue Service on October 16, 1972 and to further determine to what extent there was negligent and/or incompetency within the service that may not only have affected the writer but also other citizens.
>
> "Instead of promptly and expediently complying with my request in the meeting with Mr. Knobbe, Mr. Choate and Mr. Mitchell on January 2, 1975, I was subjected to their gyrations and dilatory tactics and the matter was deferred to a later date, mainly January 16, 1975 at which time Mr. Knobbeand Mr. Choate failed to appear for the appointment with proper disclosure.
>
> "As mentioned supra on February 19, 1975 I directed a final request to Mr. Clyde Bickerstaff. Instead of complying, Mr. Bickerstaff advised me that he was referring this matter to the Assistant Commissioner of Compliance for response. On or about the 24th of February I received a letter from Mr. H.A. McGuffin, A cting Assistant Commissioner of Compliance with an 'Edited version of reocrds per Federal Income Tax for year 1971', which did not comply in any form or fashion with my request or the intent and meaning of Title 5 U.S.C. 552 et seq as amended of the Freedom of Information Act or the various judicial determinations. Instead I was subjected to the epitome of harrassment by the aforementioned parties and others unknown to intimidate any responsible citizen.
>
> "For your edification, in the material I received from Mr. McGuffin, it reflects the date of my request as being January 6, 1975 and among some of the material enclosed is 'a memo for the record' by Mr. Wendell Nobbe dated December 13, 1974 stating 'that I forwarded his request (Polin) to the National office for reply.' For your further information as amended 1040X return

was filed by Certified Mail with Mr. Clyde Bickerstaff on November 19, 1974 and on February 22, 1975 I requested information from Mr. Bickerstaff the status of this amended return. Mr. Bickerstaff responded on February 28, 1975 advising that he is collecting the data and will assign to an agent for evaluation.

"I am, therefore, making an appeal to you as set forth in Title 5 U.S.C. section 552 et seq as amended to provide me with all information including but not limited to correspondence, communications, directives, investigative data, tax returns, internal memos, staff opinions and any other data that is currently in my file that relates to myself or my wife under taxpayer #358-14-0279 that maybe in the district office, regional office or in any other offices of the Internal Revenue Service that maybe accessible to you, and to further overrule the previous arbitrary and capricious denial of Mr. McGuffin on February 18, 1975 and the Internal Revenue Service employees previously mentioned.

"Let me further state that I do not condone the incompetent, procrastination, arbitrary and capricious handling of this matter or the harrassment and intimidating techniques that your subordinates engaged in as I consider same to be the epitome of waste and inefficiency of tax revenue. By letter copy I am asking Congressman James R. Jones, a member of the House Ways and Means Committee, to forward this letter with the enclosed data to the appropriate Congressional Committee for investigation.

"Hoping that you shall see fit to comply with my request fully and without further adieu, I beg to remain."

16. On April 17, 1975, Donald C. Alexander, wrote the following letter to plaintiff, i.e.:

"This is in response to your letter of March 10, 1975, in which you appeal the partial denial of your freedom of Information Act request for records from your file. The partial denial involved your documents, in each of which one or more deletions were made before release to you.

"Thorough consideration of your appeal has led to the conclusion that three of the four documents in issue should be made available to you in complete, undeleted form. Copies of these three documents are attached.

"Regarding the fourth document, the affidavit dated November 15, 1975, it is the position of this office that the deletion, made on the basis of subsection (b) (5) of the freedom of Information Act, was proper, as the deleted material constitutes a portion of an intra-agency memorandum devoted to the opinions and conclusions of a Service employee. As to this one document the initial denial is affirmed and your appeal is hereby denied.

"Under the Freedom of Information Act as amended, you have theright to seek review of this decision in the federal courts. Such a suit may be brought in the United States District Court for the district in which you reside or have your principal place of business, or in the district in which the records you seek are located. The ecords are located in the Oklahoma City District Office."

17. The affidavit of John Choate, "Exhibit A" attached to the Motion for Summary Judgment reflects the following:

"JOHN CHOATE, hereby deposes and says:

"1. I am Chief, Special Procedures Staff, within the Oklahoma City, Oklahoma Office of the Internal Revenue Service.

"2. In that capacity, I participated in and am familiar with the actions taken by the Internal Revenue Service in processing the Freedom of Information Act request of Mr. Paul William Polin.

"3. The search for documents coming within Mr. Polin's request, which was instituted as a result of that request, encompassed the Oklahoma offices of the Internal Revenue Service's Audit, Appellate, and Collection Divisions.

"4. All records located by the search described above were either: (a) Made available for Mr. Polin's inspection in the Service's Oklahoma City office; or (b) Forwarded to the Service's National Office in Washington, D.C., for evaluation by the Service's Disclosure Staff.

"5. To the best of my knowledge and belief, based on information received from the Disclosure Division within the Office of the Chief Counsel of the Internal Revenue Service, all records located by the search described above which were forwarded to the National Office for evaluation were eventually released to Mr. Polin in complete, unedited form.

"6. It is therefore my belief that all records relating to Mr.Polin which were located by the search instituted as a result of Mr. Polin's Freedom of Information Act request were made available for his inspection.

"7. Subsequent to the filing by Mr. Polin of his complaint in this action, and pursuant to instructions from the Disclosure Division attorney in charge of the case, a second search for records coming within Mr. Polin's request was performed. This search did not locate any records not located by the initial search."

18. Turning to the seizure of the automobile in the Second Cause of Action, the affidavit of Jerry Mitchell, Revenue Officer, "Exhibit C" to the Motion for Summary Judgment, reflects the following, commencing on page 3:

"Questions of ownership and equity being satisfied, and because Mr. Polin did not come forth with the partial payment that he indicated he would, on February 13, 1975, I took Revenue Officer Ronnie Morris as a witness

and seized the two vehicles that Plaintiff mentions in his petition. No damage was done by anyone to the two vehicles. Morris and I can attest that no damage was done during the hookup of the vehicles and until the time of departure from the Polins' premises by the wrecker drivers. One of the drivers had to unlock the VW door to secure the steering mechanism for some reason to prevent damage during towing. He did no damage in entering the vehicle. Morris and I did not follow the tow trucks to the storage area or see the vehicles after they were towed away from Polin's residence.

"I fail to see how the Polins could have suffered lost earnings because they did not have the vehicles. They were seized at 9:00 AM on February 13 h and released at 4:25 PM the next day, February 14th. We learned after the seizure on February 13th that Mr. Polin was in the hospital when the seizure was made. He telephoned me from the hospital. The vehicles were released the next day to Mrs. Polin, in consideration of full payment of the tax account, because Mr. Polin was still in the hospital. Mrs. Polin apparently did not need the vehicles to get to her work, if she was working, as no one was at the home (no response to door knocks) when we seized the vehicles. So apparently she used other transporation anyway.

"Estle Mooney accompanied me to the First National Bank in Tulsa where Mrs. Polin requestedme to meet her to effect release of the vehicles. She signed the release for the vehicles after reading the language on Part 3 of the Form 2433, entitled Receipt for Property Returned. She accepted the property 'as being in the same condition as when seized'."

19. The Receipt for Property Returned Under Release of Levy, states in pertinent part:

"I hereby acknowledge receipt of the property or rights to property as enumerated and described on the reverse, and I accept such property as being in the same condition as when seized. Further, I waive all claims against the United States for any damages or expenses incurred in connection with this seizure."

20. On the cause of action dealing with the vehicles plaintiff seeks to recover the following: $250.00 for lost earnings; $18.00 for the tow-in costs of the 1973 Audi; $18.00 for the tow-in costs of the 1969 Volkswagen Bus; $95.56 for damages allegedly done to the Volkswagen Bus; $9,500 for pain, anquish and suffering.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

1. The Court finds that this case is ripe for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, there being no genuine issue as to a material fact.

2. The Court will deal with the law applying to each Count as hereinabove set forth in the Findings of Fact.

3. On page 8 of his brief, plaintiff states:

> "The contention of the Defendant suggesting that the Plaintiff has not satisfied the jurisdictional pre-requisites for maintenance of a suit for refund are frivolous.
>
> "The Plaintiff has no dispute with the facts set forth by the Defendant merely the application of the applicable interpretation of law." (Emphasis supplied)

Thus, plaintiff acknowledges that the amended return filed in 1972 is indeed a claim for abatement rather than a claim for refund a pre-requisite to a suit for refund by statute. 26 U.S.C. §7422(s).

4. In Rock Island & Co. R.R. v. United States, 254 U.S. 141 (1920) the Court affirmed dismissal of plaintiff's refund suit, predicated on a claim for abatement, and stated that the claim for refund required by statute means an appeal to the Commissioner after payment, a requirement not satisfied by a claim for abatement. See also R. J. Reynolds Tobacco Co. v. Robertson, 80 F.2d 966 (4th Cir. 1936).

5. The Court, therefore, finds, that the defendant's Motion for Summary Judgment should be sustained as to Count Three dealing with the refund claim for lack of jurisdiction.

6. The Court finds with reference to the claim asserted under the Freedom of Information Act that at the time of plaintiff' first request there was no ten day time limit on responding to initial requests nor twenty day limit on appeal in effect. (See Freedom of Information Act prior to amendment).

7. At the time of plaintiff's initial request, Title 5 U.S.C. §552(a)(3) provided:

> "***each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person." (Emphasis supplied)

8. That plaintiff, in his initial requests, and the following requests did not comply with the minimum specificity requirement of the Act.

9. The Court finds that plaintiff has been supplied all the records which he requested.

10. The Court finds, therefore, that the Defendant's Motion for Summary Judgment as to Count One under the Freedom of Information Act should be sustained as moot.

11. Count Two deals with the seizure of the two vehicles.

12. Plaintiff asserts his claim pursuant to 28 U.S.C. §1346(a)(1) and (2), which provide:

> "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. ***."

This is commonly referred to as the "Tucker Act".

13. The Court finds that plaintiff has failed to state a claim upon which relief can be granted as to Count Two. The Court finds that no claim, additionally, was filed for any alleged damage prior to the institution of this litigation. This is a jurisdictional requirement and failure to comply constitutes a fatal defect. Melo v. United States, 505 F.2d

1026 (8th Cir., 1974).

14. There is no allegation that the tax was illegally or erroneously assessed.

15. A claim for damages cannot be considered as part of an otherwise proper suit for refund over which the Court has jurisdiction under subsection (a)(1) of the Tucker Act.

16. Plaintiff has not stated a claim under Subsection (a)(2) of the Tucker Act.

17. Subsection (a)(2) of the Tucker Act expressly prohibits claims in tort.

18. There is no waiver of sovereign immunity for tort actions provided by Section 1346(a)(2) of Title 28. Yearsley v. Ross Construction Co., 309 U.S. 18 (1940).

19. The defendant's Motion for Summary Judgment as to Count Two should be sustained for lack of jurisdiction.

IT IS SO ORDERED.

ENTERED this 28th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HELEN L. WHITE,

Plaintiff,

vs.

DAVID MATHEWS,
Secretary of Health, Education,
and Welfare,

Defendant.

76-C-496-B

FILED

MAR 28 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, the brief in support thereof, and, having carefully persued the entire file, and, being fully advised in the premises, finds:

That on January 31, 1977, the following minute order was entered by the Court.

> "It is ordered by the Court that the Plaintiff file a responsive brief within ten (10) days to the Defendant's Motion to Dismiss."

Plaintiff has not filed a responsive brief, nor has plaintiff requested an extension of time to do so.

The Court will, therefore, consider the Motion to Dismiss based on the existing file.

Plaintiff filed her complaint on September 29, 1976. On January 15, 1976, a hearing decision was rendered and a copy of said decision was mailed to the plaintiff. Thereafter, the plaintiff requested review of this decision. On July 30, 1976, the Appeals Council sent, by certified mail, addressed to the plaintiff, at Route 1, Box 116 BB, Miami, Oklahoma 74354, notice of its action on the request of plaintiff for review and of her right to commence a civil action within sixty (60) days.

It appears from the file, therefore, the plaintiff did not timely file the instant litigation and the same is barred by the time limitation specified in section 205(g) of the Social Security Act, 42 U.S.C. 405(g), because it was not commenced within 60 days after the dateofthe mailing to plaintiff of notice of the final decision of the Secretary of Health, Education and Welfare, and the time for commencing the action was not extended by the Appeals Council of the Social Security Administration. (See Affidavit of Paul R. Muller, Chief of the Civil Actions Branch of the Bureau of Heaings and Appeals, Social Security Administration attached to brief in support of Motion to Dismiss).

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant be and the same is hereby sustained, and the cause of action and complaint are hereby dismissed.

ENTERED this 28th day of March, 1977.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ELLIS L. WILLIAMS, BETTYE L. WILLIAMS a/k/a BETTY WILLIAMS, TULSA HOUSING AUTHORITY FOR THE CITY OF TULSA, GUARANTY LOAN AND INVESTMENT CORPORATION OF TULSA, INC., BOULDER BANK AND TRUST COMPANY, a Corporation, ALLIED PLUMBING COMPANY OF TULSA, INC., CARL H. ABEL, JR., SARA W. ABEL, COPPER OAKS, LTD, a Limited Partnership, and OKLAHOMA TAX COMMISSION, Defendants.	)	CIVIL ACTION NO. 76-C-174-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 28th day of March, 1977, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendant, Guaranty Loan and Investment Corporation of Tulsa, Inc., appearing by its attorney, Timothy J. Sullivan, Rizley, Prichard, Norman & Reed; the Defendant, Copper Oaks, Ltd., a Limited Partnership, appearing by its attorney, David H. Sanders, Jr., Sanders, McElroy & Carpenter; the Defendant, Oklahoma Tax Commission, appearing by its attorney, Clyde E. Fosdyke; the Defendant, Boulder Bank and Trust Company, a Corporation, appearing by its attorney, Irvine E. Ungerman, Ungerman, Grabel & Ungerman; the Defendant, Sara W. Abel, appearing by her attorney, Delbert Brock; the Defendant, Tulsa Housing Authority for the City of Tulsa, appearing by its attorney, Robert S. Rizley, Rizley, Prichard, Norman & Reed; and, the Defendants, Ellis L. Williams, Bettye L. Williams a/k/a Betty Williams, Allied Plumbing Company of Tulsa, Inc. and Carl H. Abel, Jr., appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Ellis L. Williams and Bettye L. Williams a/k/a Betty Williams, were served by publication as shown on the Proof of Publication filed herein; and, that Defendant, Tulsa Housing Authority for the City of Tulsa, was served with Summons, Complaint and Amendment to Complaint on April 21, 1976, and May 10, 1976, respectively; that Defendants, Guaranty Loan and Investment Corporation of Tulsa, Inc., Boulder Bank and Trust Company, a Corporation, and Allied Plumbing Company of Tulsa, Inc., were served with Summons, Complaint and Amendment to Complaint on April 21, 1976, and May 7, 1976, respectively; that Defendant, Carl H. Abel, Jr., was served with Summons, Complaint and Amendment to Complaint on May 10, 1976; that Defendant, Sara W. Abel, was served with Summons, Complaint and Amendment to Complaint on April 22, 1976, and May 10, 1976, respectively; that Defendants, Copper Oaks, Ltd., a Limited Partnership, and Oklahoma Tax Commission, were served with Summons, Complaint and Amendment to Complaint on May 7, 1976; all as appears from the United States Marshal's Services herein.

It appearing that the Defendant, Copper Oaks, Ltd., a Limited Partnership, has duly filed its Answer herein on May 10, 1976; that Defendant, Oklahoma Tax Commission, has duly filed its Answer and Cross-Petition on July 27, 1976; that Defendant, Boulder Bank and Trust Company, a Corporation has duly filed its Disclaimer on May 7, 1976; that Defendant, Sara W. Abel, has duly filed her Disclaimer on May 10, 1976; that Defendant, Tulsa Housing Authority for the City of Tulsa, has duly filed its Disclaimers on April 23, 1976, and May 18, 1976; that Defendant, Guaranty Loan and Investment Corporation of Tulsa, Inc.,has duly filed its Disclaimer on February 23, 1977; and, that Defendants, Ellis L. Williams, Bettye L. Williams a/k/a Betty Williams, Allied Plumbing Company of Tulsa, Inc., and Carl H. Abel, Jr., have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following-described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nine (9), Block Forty-Seven (47), in VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Ellis L. Williams and Bettye L. Williams, did, on the 29th day of May, 1973, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $10,250.00 with 4 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Ellis L. Williams and Bettye L. Williams, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,911.56 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from June 1, 1975, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Oklahoma Tax Commission, is entitled to judgment against Defendant, Carl H. Abel, in the amount of $91.63 with interest of 6 percent per annum plus costs accrued and accruing, dated December 31, 1975, entered February 25, 1976, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Copper Oaks, Ltd., a Limited Partnership, is entitled to judgment against Defendant, Carl H. Abel, Jr., in the amount of $35,974.50 with interest of 10 percent per annum from date of judgment and costs,

accrued and accruing dated April 7, 1976, entered April 12, 1976, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Ellis L. Williams and Bettye L. Williams, in rem, for the sum of $9,911.56 with interest thereon at the rate of 4 1/2 percent per annum from June 1, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Oklahoma Tax Commission have and recover judgment against the Defendant, Carl H. Abel, in the amount of $91.63 with interest of 6 percent per annum plus costs accrued and accruing as of the date of this judgment, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Copper Oaks, Ltd., a Limited Partnership, have and recover judgment, in rem, against the Defendant, Carl H. Abel, Jr., in the amount of $35,974.50 with interest of 10 percent per annum from date of this judgment plus costs accrued and accruing, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Allied Plumbing Company of Tulsa, Inc. and Carl H. Abel, Jr.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money

judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

CLYDE E. FOSDYKE
Attorney for Defendant
Oklahoma Tax Commission

DAVID H. SANDERS, JR.
Attorney for Defendant
Copper Oaks, Ltd.
a Limited Partnership

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

EDITH PAULINE SMITH, Plaintiff,

vs.

LaBARGE, INC., a Foreign Corp., Defendant.

No. 76-C-177-C

ORDER OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY AND SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO THE CAUSE OF ACTION FOR SLANDER AND OVERRULING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE QUESTION OF BLACKLISTING

Now on this 3rd day of March 1977, this cause comes on for hearing, having been set for oral argument on the Motion's of plaintiff and defendant for summary judgment. Plaintiff appeared by John M. Keefer, her attorney and the Defendant appeared by Robert J. Woolsey, of Farmer, Woolsey, Tips & Gibson, Inc., defendant's attorney. The court having heard argument of counsel and having considered the motions finds that plaintiff's complaint alleges two causes of action. The first cause of action predicated upon blacklisting, title 40 Oklahoma Statutes, Sect. 172, and the second cause of action predicated upon slander. The court finds that both the plaintiff's motion for summary judgment and the defendant's motion for summary judgment on the question on blacklisting should be overruled.

The court finds as to the second cause of action, as a matter of law the statements made by representatives of the defendant to Process and Pollution Controls do not of itself constitute slander. And therefore the court finds that the motion of the defendant for summary judgment on the cause of action based on slander should be sustained.

It is therefore ordered, adjudged and decreed that the plaintiff's motion for summary judgment and defendant's motion for summary judgment in regard to the first cause of action be and the same are hereby overruled. It is further ordered that the

FARMER, WOOLSEY TIPS & GIBSON INCORPORATED ATTORNEYS AT LAW FIFTH FLOOR MID-CONTINENT BLDG. TULSA, OKLAHOMA 74103 (918) 585-1181

defendant's motion for summary judgment in regards to plaintiff's second cause of action for slander be and the same is hereby sustained.

/s/ H. Dale Cook
JUDGE

Approved as to Form:

John M. Keefer
JOHN M. KEEFER
Attorney for Plaintiff

Robert J. Woolsey
ROBERT J. WOOLSEY
Attorney for Defendant

FARMER, WOOLSEY
TIPS & GIBSON
INCORPORATED
ATTORNEYS AT LAW
FIFTH FLOOR
MID-CONTINENT BLDG.
TULSA,
OKLAHOMA 74103
(918) 585-1181

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and RETAIL CLERKS UNION, LOCAL NO. 73 Plaintiffs, vs. SAFEWAY STORES, INC., Defendant. TULSA GENERAL DRIVERS, WAREHOUSE & HELPERS, LOCAL 523; AMALGAMATED MEAT CUTTERS & BUTCHERS WORKMEN OF NORTH AMERICA AFL-CIO, DISTRICT LODGE NO. 644; SOUTH CENTRAL DIVISION RETAIL CLERKS UNION & EMPLOYEES HEALTH & WELFARE TRUST. Defendants Under Rule 19(a)2	CIVIL ACTION NO. 75-C-522-B ORDER

FILED

MAR 28 1977 1:40

Jack C. Silver, Clerk
U. S. DISTRICT COURT

NOW on this 28th day of March, 1977, this matter came on before me upon the Application of Mr. James L. Lee, Counsel for Plaintiff, Equal Employment Opportunity Commission, and Mr. James L. Kincaid, Counsel for South Central Division Retail Clerks Union & Employees Health & Welfare Trust, Defendant Under Rule 19(a)(2).

IT IS HEREBY ORDERED that the Joint Motion to Dismiss the South Central Division Retail Clerks Union & Employees Health & Welfare Trust, defendant herein under Rule 19(a)2 of the Fed. R. Civ. P., from this case is granted.

Allen E. Barrow
CHIEF UNITED STATES DISTRICT JUDGE

4

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LEO HAMIL, et al., Plaintiffs, vs. EDWIN YOUNGBLOOD, Regional Director, Region 16, N.L.R.B., UNITED STEELWORKERS UNION OF AMERICA, and JOHN ZINK COMPANY, Defendants.	)	No. 76-C-505-C

J U D G M E N T

This action came on for hearing before the Court of the Honorable H. Dale Cook, District Judge, and the issues having been duly heard and the Court being fully informed and a decision having been duly rendered,

IT IS ORDERED ADJUDGED AND DECREED that the National Labor Relations Board proceed with consideration of the decertification petition filed by the employees as provided by the Act. The Board shall conduct an appropriate investigation, after which, if it finds that in the light of the purposes of the Act the rationale of the blocking charge rule can be effectuated by "blocking" the decertification petition, then the Board should provide petitioners, in written form, a statement of the facts found which warrant a dismissal of the petition. In the event the investigation by the Board discloses that in keeping with the rationale of the rule and the intent of the Act, a dismissal of the employees' decertification petition is not warranted, the Board should proceed in regard thereto.

It is so Ordered this 28th day of March, 1977.

H. Dale Cook

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE Northern ~~WESTERN~~ DISTRICT OF OKLAHOMA

FILED

MAR 24 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

WILLIAM ISELIN & CO., INC., a corporation,	)	
Plaintiff,	)	
v.	)	NO. 76-C-383 ✓
WILLIAM W. WILSON, SR., and WILLIAM W. WILSON, JR.,,	)	
Defendants.	)	

STIPULATION OF SETTLEMENT AND ORDER OF APPROVAL

IT IS HEREBY STIPULATED, that the above captioned action is settled upon the following terms and conditions:

1. Defendants acknowledge that they are jointly and severally indebted to plaintiff in the sum of $33,882.20 together with interest thereon at the rate of 8-1/4% per annum from May 1, 1976 until paid and they hereby withdraw all affirmative defenses asserted in their Answer on file herein.

2. In consideration thereof plaintiff agrees that the foregoing sum together with a reasonable attorney fee in the sum of One Thousand Five Hundred and no/100 Dollars ($1,500.00) and the costs of this action may be paid in installments as follows:

(a) Two Hundred and 00/100 Dollars ($200.00) per month for the first year commencing April 1, 1977.

(b) Five Hundred and 00/100 Dollars ($500.00) per month for the next three (3) years commencing April 1, 1978.

(c) Seven Hundred Fifty and 00/100 Dollars ($750.00) per month commencing April 1, 1981 and continuing until the aforesaid indebtedness is paid in full including interest, attorney fees and costs.

(d) Each installment shall be by check payable to the order of Otterbourg, Steindler, Houston & Rosen, P.C. as attorneys

for William Iselin & Co., Inc., and shall be received at their offices at 230 Park Avenue, New York, New York 10017 not later than 5:00 P.M. on the 1st day of each calendar month.

3. Upon payment of the foregoing sums in full, the above captioned case will be dismissed with prejudice but in the event of the failure by defendants to make any installment payment on the date on which the same is due, defendants shall be in default, and if the default is not cured within fifteen (15) days after such default, plaintiff shall have the right, without notice to defendants to have judgment entered in the above captioned action in the amounts prayed for in plaintiff's Complaint less any payments received pursuant to this Stipluation.

4. Defendants shall also be deemed in default under this Stipulation in the event of the appointment of a Receiver over any substantial portion of their properties, or their filing of a voluntary or involuntary Petition in Bankruptcy including any re-organization or Petition for Arrangement occurring after the date of this Stipulation.

EXECUTED AND DELIVERED THIS 17th day of March, 1977.

IT IS SO ORDERED THIS 24th
DAY OF MARCH, 1977.

Owen E. Barnes
UNITED STATES DISTRICT JUDGE

William W. Wilson
WILLIAM W. WILSON, SR.

William W. Wilson, Jr.
WILLIAM W. WILSON, JR.

James V. Collins
JAMES V. COLLINS
Attorney for Defendants

JOHN W. SWINFORD
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

COMMUNICATION ASSOCIATES, INC., JACK S. JAMES, and VAL BOELCSKEVY, Plaintiffs	
VS.	CIVIL ACTION NO. 76-C-402B
E. W. McCAIN, JR., EQUIVEST, INC., EQUIVEST INTERNATIONAL, INC., EQUIVEST FINANCIAL CORPORATION, and M. ROSE RALEY, Defendants.	

ORDER OF DISMISSAL WITH PREJUDICE

On this day, Plaintiffs, Communications Associates, Inc. ("CA"), Jack S. James ("James"), and Val Boelcskevy ("Boelcskevy") and Defendants, E. W. McCain, Jr. ("McCain"), Equivest, Inc. ("Equivest"), Equivest International, Inc. ("EI"), Equivest Financial Corporation ("EFC"), and M. Rose Raley ("Raley") presented their joint motion for dismissal with prejudice of the above captioned and numbered cause for the reason that all matters in controversy between the parties herein have been fully compromised and settled, and it appears that dismissal with prejudice is appropriate.

It is, therefore, ORDERED, ADJUDGED, and DECREED that:

(a) the above captioned and numbered cause is dismissed with prejudice to the right of CA, James, and Boelcskevy to again assert or litigate in any form the claims, demands, or causes of action arising out of the occurrences described in the pleadings herein or which by pleading, amendment, or supplement could have been asserted herein against McCain, Equivest, EI, EFC, and/or Raley;

(b) the above captioned and numbered cause is dismissed with prejudice to the right of McCain, Equivest, EI, EFC, and Raley to again assert or litigate in any form the claims, demands, or causes of action arising out of the occurrences described in the pleadings herein or which by pleading, amendment, or supplement could have been asserted herein against CA, James, and/or Boelcskevy; and

(c) that each party shall bear its own costs incurred herein.

Signed, rendered, and entered on this 24th day of March, 1977.

Allen E. Barrow
United States District Judge

APPROVED AS TO SUBSTANCE
AND FORM:

Richard T. Sonberg
Of SONBERG & WADDEL
907 Philtower Building
Tulsa, Oklahoma 74103
(918) 583-5985

By Richard T. Sonberg
Attorney for Plaintiffs

Gaynell C. Methvin
David P. Seikel
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& BARBEE
4700 First International Building
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Of UNGERMAN, GRABEL & UNGERMAN
Sixth Floor, Wright Building
Tulsa, Oklahoma 74103
(918) 584-6101

By David P. Seikel
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD RAY BOWMAN, Petitioner,	)	
v.	)	NO. 77-C-6 ✓
DAVE FAULKNER, Sheriff, Tulsa County Jail, et al., Respondents.	)	

ORDER

The Court has for consideration a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis by Petitioner Donald Ray Bowman. From review thereof, based on the Petitioner's own admissions, the Court finds that Donald Ray Bowman is a prisoner in the Tulsa County Jail serving a sentence of one year upon his conviction in the Tulsa County District Court, State of Oklahoma, in case No. CRF-76-2107. Therein, Petitioner was charged with grand larceny. This charge was reduced to knowingly receiving stolen property, and Petitioner pled guilty to the lesser offense. He did not file a direct appeal.

As grounds for his petition before this Court, Petitioner asserts that he entered his plea of guilty on the understanding that he would receive credit on his one-year sentence for the time served in custody awaiting trial; a promise which was not kept, in violation of his rights guaranteed by the Constitution of the United States to due process and equal protection of the law. Petitioner further claims to have exhausted his State remedies by having filed in the District Court of Tulsa County a writ of mandamus seeking credit on his sentence for his pre-trial custody which was overruled, and which ruling he thinks was appealed to the Oklahoma Court of Criminal Appeals, and that the high Court has as yet rendered no decision. Having thoroughly reviewed the petition and being fully advised in the premises, the Court finds that Petitioner has failed to exhaust his Oklahoma State remedies. Petitioner claims to have a proceeding pending before the high Court of the State of Oklahoma. If he is unsuccessful in that mandamus proceeding, if there is such a pending proceeding, or if he failed to appeal the alleged State District Court ruling thereon, he still has adequate and available remedies in the State Courts of Oklahoma where he may present the specific issue presented to this Court. He may present said claim to the State Courts

pursuant to the Oklahoma post-conviction procedure act, 22 O.S.A. § 1080, et seq., or the Oklahoma habeas corpus statutes, 12 O.S.A. § 1331, et seq. Prior to a ruling by the high Court of the State of Oklahoma on the issue he raises in his Federal petition, his petition to this Court must be denied, and there is no need for response, evidentiary hearing, or the appointment of counsel herein at this time. There is no principle in the realm of Federal habeas corpus better settled than that State remedies must be exhausted.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Donald Ray Bowman be and it is hereby denied for failure to exhaust adequate and available Oklahoma State remedies and the case is dismissed without prejudice to a later petition, if necessary, after the State remedies have been exhausted.

Dated this 24th day of March, 1977, at Tulsa, Oklahoma.

CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

N THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LESLIE W. McCOWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	73-C-71-C
	)	
JAMES W. HEIDLER, et al.,	)	
	)	
Defendants.	)	

ORDER DISMISSING ACTION AS TO DEFENDANT JACQUE BOGGESS

A status conference was held in this cause, pursuant to notice duly given, on March 3, 1977. The Named Plaintiffs advised the Court that the defendant Jacque Boggess had been adjudicated a bankrupt and the claims asserted against him in this action had been discharged.

It is therefore ordered that this action and the claims asserted herein against Jacque Boggess be dismissed as against the defendant Jacque Boggess.

Dated this 24th day of March, 1977.

H. Dale Cook

H. Dale Cook, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY DWAYNE LONG by his father and next of friend, JERRY E. LONG, Plaintiff,	)	
vs.	)	No. 76-C-243
JACK PURDIE, Chief of Police TULSA POLICE DEPARTMENT; HONORABLE JOE JENNINGS, Judge of the District Court, Juvenile Division, Tulsa County, Oklahoma, Defendants.	)	

ORDER OF DISMISSAL

NOW on this 24th day of March, 1977, Plaintiff's Motion for Dismissal coming on for consideration and counsel for Plaintiff herein representing and stating that all issues and controversies between the parties have been settled and compromised,

IT IS THE ORDER OF THIS COURT That said action be, and the same is, hereby dismissed without prejudice as to the Honorable Joe Jennings, Judge of the District Court, Juvenile Division, Tulsa County, Oklahoma, to the bringing of another or future action by the Plaintiff herein.

Owen Seabrook

DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 24 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

RUBY McKNIGHT, Individually, and as Surviving Mother for and on Behalf of the Heirs, Executors and Administrators of the Estate of Ronald McKnight, Deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA and THE CITY OF SAND SPRINGS, OKLAHOMA, A Municipal Corporation,

Defendants.

No. 76-C-620-B

O R D E R

The Court has for consideration the Motion to Dismiss filed by the defendant, City of Sand Springs, Oklahoma, and the brief in support thereof; and the Response thereto filed by the plaintiff; and having carefully perused the entire file and being fully advised in the premises, finds:

The defendant City of Sand Springs filed its Motion to Dismiss on the grounds that the Complaint of the plaintiff sets forth no jurisdictional grounds other than the Federal Torts Claims Act and that the plaintiff has failed to set forth any jurisdictional facts or allegations which would give this Court jurisdiction over the defendant City of Sand Springs, Oklahoma.

Jurisdiction over the defendant United States of America is premised upon 28 U.S.C. § 1346, which provides in pertinent part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Chapter 171 of that same title, 28 U.S.C. § 2671, provides that "Employee of the government" includes: "officers or employees of any federal agency . . . and persons acting on behalf of a federal agancy in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

The plaintiff alleges in her complaint that the Corps of Engineers was a divisional department of the United States of America, and was an agency of the United States of America. Plaintiff brings this action against the United States

of America for money damages for death caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their office or employment, and such claim accrued on or about the first day of January, 1976. Therefore, this Court finds that it has jurisdiction of this matter and over the defendant United States of America under the Federal Torts Claims Act.

No further jurisdictional basis is alleged to give this Court jurisdiction over the defendant City of Sand Springs, Oklahoma. Such defendant is not subject to the Federal Torts Claims Act; the City of Sand Springs is not diverse in citizenship from the plaintiff ; and no other federal question jurisdiction is alleged. As Professor Moore states:

> "Aside from the problem of joinder presented by the doctrine of sovereign immunity, there is the further problem of federal jurisdiction over plaintiff's tort claim against the individual defendant or defendants. This claim can hardly be said to present a federal matter merely because the United States is a joint tortfeasor and hence it must be supported by independent jurisdictional grounds, usually diversity or alienage between the plaintiff and the individual defendant or defendants and more than the jurisdictional amount must be involved, unless the doctrine of pendent jurisdiction develops to provide the jurisdictional basis for the claim against the individual."

3A Moore's Federal Practice, ¶20.07[3], at p. 2872 (2d ed. 1974). There is no play of the doctrine of pendent jurisdiction in this case to provide such jurisdictional basis.

Mere joinder under Federal Rule of Civil Procedure 20 does not give the Court jurisdiction over this defendant, in the absence of a showing of diversity of citizenship and the requisite jurisdictional amount. This requirement of an independent basis of jurisdiction over an individual defendant joined with the United States of America as defendant in an action under the Federal Torts Claims Act has widespread support. Benbow v. Wolf, 217 F.2d 203 (9th Cir. 1954); Wasserman v. Perugini, 173 F.2d 305 (2d Cir. 1949); Guthrie v. United States, 238 F. Supp. 855 (E.D. Wis. 1965); Anderson v. United States, 217 F. Supp. 814 (E.D. Pa. 1963);Railsback v. United States, 181 F. Supp. 765 (D. Neb. 1960); Sullivan v. United States, 120 F. Supp. 217 (N.D. Ill. 1954). This Court finds that it does not have jurisdiction over the defendant City of Sand Springs in this matter.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant City of Sand Springs, Oklahoma be and the same is hereby granted.

ENTERED this 24th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONAL E. WOFFORD,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 76-C-595-C
	)	
WAYNE M. SMITH, BEN W. DEAN, DALE M. SMITH, BETTY I. STEPANEK, CLAUDE W. PEAKE, ROUNDS & PORTER PROFIT SHARING PLAN AND TRUST and ROUNDS & PORTER LUMBER COMPANY, INC.,	)	
	)	
Defendants.	)	

O R D E R

This is a civil action for injunctive relief, or in the alternative for a monetary judgment, brought by plaintiff against his former employer, his former employer's profit sharing plan, the members of the Advisory Committee of said profit sharing plan and the Trustees of said profit sharing plan. Plaintiff alleges that the defendants have failed to properly distribute to him his vested account balance in the employer's profit sharing plan. The jurisdiction of this Court is invoked pursuant to Title 29 U.S.C. § 1132(e)(1). Pending before the Court are defendants' motions to strike, to change venue, to dismiss and for summary judgment.

The motion for summary judgment is applicable only to defendant Wayne M. Smith and is on the ground that he was never either a member of the Advisory Committee or a Trustee of the profit sharing plan at issue. Plaintiff has stipulated to the facts contained in the affidavit of Wayne M. Smith in support of his motion for summary judgment and has stated that he has no objection to the dismissal of Wayne M. Smith as a defendant, on the condition that he be permitted to amend his complaint in the event he should later discover that Wayne M. Smith was indeed connected with the profit sharing plan. For this reason,

defendant Wayne M. Smith's motion for summary judgment is hereby sustained.

Defendants ask that the Court order stricken Exhibits "B" and "C" to the Complaint on the ground that they are redundant, immaterial and "mere evidence." Under Rule 10(c) of the Federal Rules of Civil Procedure, these exhibits are a part of the Complaint for all purposes. Motions to strike are not favored. They should not be granted, even though the averments complained of are literally within the provisions of Rule 12(f), in the absence of a showing that they have no possible relation to the controversy or are clearly prejudicial to the movant. Russo v. Merck & Co., 138 F.Supp. 147 (D.R.I. 1956). The exhibits in question here clearly have a relation to the controversy, in that they are statements by some of the defendants regarding the amount of plaintiff's vested account in the profit sharing plan. This vested account is the subject matter of the present action. Defendants have not alleged, nor does the Court find, that the exhibits are in any way prejudicial to defendants. Therefore, defendants' motion to strike is overruled.

Defendants also request that the Court transfer this action, pursuant to Title 28 U.S.C. § 1404(a), to the United States District Court for the Judicial District of Kansas, at Wichita. That statute provides that ". . . [f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district where it might have been brought." The venue statute applicable to this case, Title 29 U.S.C. § 1132(e)(2), allows an action to be ". . . brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found. . . ." The defendant corporation's principal place of business appears to be in Wichita, Kansas, and this action clearly could have been brought there. Consequently, this Court has the power to transfer the action to the Judicial District of

Kansas. As factors in support of their motion to transfer, defendants allege that plaintiff is not a resident of this Judicial District, that the corporation's place of business, as well as its records and those of the profit sharing plan, are located in Wichita, that the purported breach occurred in Wichita, that this Court may be required to apply the laws of the State of Kansas, and that all of defendants' witnesses are located in Wichita.

Under § 1404(a), "[t]he movant . . . has the burden of establishing that the suit should be transferred. Unless the balance is strongly in favor of the movant the plaintiff's choice of forum should rarely be disturbed." William A. Smith Contracting Co., Inc., v. Travelers Indemnity Company, 467 F. 2d 662, 664 (10th Cir. 1972). In the instant case, while defendant corporation's principal place of business may be in Wichita, Kansas, it apparently also conducts fairly substantial operations in Tulsa, Oklahoma. The employment which gave rise to the amount in controversy was performed in Tulsa. It appears to the Court, as plaintiff has contended, that much of the evidence in this case will be in written form and likely subject to discovery procedures, and that the need for the appearance of many witnesses, for either party, is not a certainty. In addition, the Court notes that Congress has seen fit to provide plaintiffs with a greater choice of forums under Title 29 U.S.C. § 1132(e)(2) than under the general venue statute, Title 28 U.S.C. § 1391. The Court therefore finds that defendants have failed to sustain their burden of establishing that the balance is strongly in their favor, and the motion to change venue is hereby overruled.

Defendants' motion to dismiss is based upon two grounds. The first is that the suit was brought in the wrong district because plaintiff alleges the breach occurred in Tulsa, while defendants contend the site of the breach was Wichita, Kansas. As previously noted, Title 29 U.S.C. § 1132(e)(2) allows this

action to be brought in the district ". . . where a defendant resides or may be found. . . ." Defendant corporation conducts business operations in this district and is clearly "found" here. Venue in this judicial district is therefore proper, and defendants' motion to dismiss on that ground is overruled.

The second basis for defendants' motion to dismiss is that the Complaint fails to state claims upon which relief can be granted. Rule 12(b) of the Federal Rules of Civil Procedure provides that ". . . [i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The Court finds that this is a proper case to invoke this provision of Rule 12(b) since matters outside the pleading have been presented to and not excluded by the Court. Therefore, the parties are hereby given ten (10) days from the date hereof to present to the Court all materials made pertinent to a motion for summary judgment under Rule 56.

It is so Ordered this 23rd day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MACK CENIOR CARR,	)	
	)	
Plaintiff,	)	76-C-395-B
	)	
vs.	)	
	)	
CHEMICAL EXPRESS CARRIERS, INC.,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This litigation was tried to the Court non-jury on March 21, 1977, and the Court, after hearing all of the evidence adduced at said non-jury trial, and the arguments of counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This litigation arose out of a vehicle collision which occurred on February 25, 1976.

2. Plaintiff was driving his vehicle on the date of the accident.

3. Defendant's vehicle was being driven Roy Farley, an employee of defendant in the course and scope of his employment.

4. Both vehicle were going in a Easterly direction, with plaintiff's vehicle proceeding ahead of the vehicle being driven by defendant's employee.

5. Defendant's vehicle had pulled to the outer lane and was attempting to pass plaintiff's vehicle.

6. At the time defendant's vehicle was attempting to pass the plaintiff made a left-hand turn. Plaintiff did not signal said left hand turn by means of either his hands or the mechanical signal of his vehicle. Defendant did see plaintiff apply his

brakes and did see the brake lights come on when defendant's vehicle was approximately beside the vehicle of the plaintiff.

7. Plaintiff complains of injuries to his shoulder, back, teeth, and side of his face, and, additionally complains of an aggravation of a pre-existing injury. Plaintiff sought and obtained medical aid for said injuries.

8. Plaintiff became obligated in the amount of $393.00 for the medical treatment he obtained.

9. Additionally, plaintiff's vehicle was totalled, and after deducting the $100.00 deductible, plaintiff suffered a damage by reason of the damage to said automobile in the amount of $1139.00.

10. Defendant counter-claimed for damages to its vehicle in the amount of $587.39.

11. That the plaintiff was 45% negligent in this accident and the defendant was 55% negligent.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

1. This Court has jurisdiction pursuant to 28 U.S.C. §1332.

2. Title 23 O.S.A. §12 provides:

> "Contributory negligence shall not bar recovery of damages for any injury, property damage or death where negligence of the person injured or killed is of a lesser degree than the negligence of any person, firm, or corporation causing such damage.
>
> "In all actions hereafter accruing for negligence resulting in personal injuries or wrongful death or injury to property, contributory negligence shall not prevent recovery where any negligence of the person so injured, damaged, or killed is of lesser degree than any negligence of the person, firm or corporation causing such damage; provided that where such contributory negligence is shown on the part of the person injured, damaged or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence."

3. The Court, therefore, finds that plaintiff should recover the sum of $1,000.00 on his complaint from the defendant, and that the defendant recover nothing on its counter-claim against the plaintiff.

ENTERED this 23rd day of March, 1977.

Allen E. Barnes

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MACK CENIOR CARR,	)	
	)	
Plaintiff,	)	
	)	76-C-395-B ✓
vs.	)	
	)	
CHEMICAL EXPRESS CARRIERS, INC.,	)	
	)	
Defendant.	)	

JUDGMENT

Based on the Findings of Fact and Conclusions of Law entered this date,

IT IS ORDERED that judgment be entered in favor of the plaintiff and against the defendant on plaintiff's complaint in the sum of $1,000.00 and the judgment be entered in favor of the plaintiff and against the defendant on defendant's counter-claim.

ENTERED this 23rd day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

17.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MACK CENIOR CARR,	)	
	)	
Plaintiff,	)	
	)	76-C-395-B
vs.	)	
	)	
CHEMICAL EXPRESS CARRIERS, INC.,	)	
	)	
Defendant.	)	

JUDGMENT

Based on the Findings of Fact and Conclusions of Law entered this date,

IT IS ORDERED that judgment be entered in favor of the plaintiff and against the defendant on plaintiff's complaint in the sum of $1,000.00 and the judgment be entered in favor of the plaintiff and against the defendant on defendant's counter-claim.

ENTERED this 23rd day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE FARM FIRE AND CASUALTY COMPANY,	)	
Plaintiff,	)	
vs.	)	76-C-360-B
EDWARD C. SQUIRE, ANDY SQUIRE, and MAT SQUIRE,	)	
Defendants.	)	

ORDER REMANDING

The parties having filed a Joint Motion to Remand to State Court, and, the Court having carefully perused the entire file, and, being fully advised in the premises, finds that said Motion should be sustained.

IT IS, THEREFORE, ORDERED that the Joint Motion to Remand to State Court be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the District Court of Tulsa County, Oklahoma.

ENTERED this 23rd day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LLOYD RUDDELL,)
)
Plaintiff,)
)
vs.)
)
CITY OF JENKS, et al.,) Case No. 76-C-220
)
Defendants.

APPLICATION

Comes now the plaintiff, LLOYD RUDDELL, and respectfully makes application to the Court to dismiss the above-styled cause upon the grounds and for the reason that the plaintiff and the defendants have entered into a non-judicial agreement on the 21st day of March, 1977.

Plaintiff prays the Court to allow said dismissal without prejudice for good cause as set out above.

HALL, ESTILL, HARDWICK, GABLE,
COLLINGSWORTH & NELSON

Frank M. Hagedorn

FRANK M. HAGEDORN
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, OK 74103
Attorneys for Plaintiff

O R D E R

This matter presented to the Court on the 22nd day of March, 1977, upon the application of the plaintiff to dismiss the above-styled cause for the reason that a non-judicial settlement has been reached between the parties and plaintiff prays dismissal without prejudice. After reviewing same, and all premises considered,

IT IS, THEREFORE, ORDERED that LLOYD RUDDELL vs. CITY OF JENKS, et al., No. 76-C-220, ~~is~~ the cause of action & complaint are hereby dismissed on this 22nd day of March, 1977, without prejudice.

Allen E. Barrow

ALLEN E. BARROW
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

CERTIFICATE OF MAILING

I, Frank M. Hagedorn, hereby certify that I mailed a true and correct copy of the foregoing application and order to defendants' attorneys of record, Morehead, Savage, O'Donnell, McNulty & Cleverdon, Suite 500, Two Hundred One Office Building, Tulsa, OK 74103, on the _____ day of March, 1977, with proper postage thereon fully prepaid.

Frank M. Hagedorn

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REPUBLIC GAS & OIL CO., a corporation,

Plaintiff,

vs.

BANK OF OKLAHOMA, N.A. and JOHN ROGERS, Co-Executors of the Estate of Horace G. Barnard, Deceased,

Defendant.

77-C-102-B

ORDER REMANDING

SUA SPONTE, IT IS ORDERED that this cause of action and complaint are remanded to the District Court of Osage County, Oklahoma, for the following reasons:

In an action invoking the original jurisdiction of the district court on the basis that the action is one arising under the federal ground must appear in the complaint well pleaded. This same principle applies to removal since it is keyed to original jurisdiction; and there can be no removal on the basis of a federal question presented for the first time in defendant's petition for removal or in his answer. The rule is summed up by the Supreme Court in Great Northern Ry. Co. v. Alexander (Hall's Adm'r.) 246 U.S. 276 (1918). Moore's Federal Practice, Volume 1A, ¶0.160.

ENTERED this 22nd day of March, 1977.

CHIEF UNITED STATES DISTRICT JUDGE

IH/gsk

IN THE UNITED STATES DISTRICT COURT IN AND FOR

THE NORTHERN DISTRICT OF OKLAHOMA

LEAGUE OF WOMEN VOTERS OF TULSA, INC., a non-profit corporation; LEAGUE OF WOMEN VOTERS OF OKLAHOMA, INC., a non-profit corporation; PATRICIA LANER; SUDYE NEFF KIRKPATRICK, AND KATHY GROSHONG,	)	
Plaintiffs,	)	
v.	)	No. 77-C-54-C
THE UNITED STATES OF AMERICA ex rel THE DEPARTMENT OF DEFENSE AND THE UNITED STATES CORPS OF ENGINEERS AND HON. HAROLD BROWN, Secretary of Defense; Lieutenant General John W. Morris, Commanding Officer United States Corps of Engineers and COLONEL ANTHONY A. SMITH, Commanding Officer, United States Corps of Engineers, Tulsa District,	)	
Defendants.	)	
And	)	
THE UNITED STATES OF AMERICAN ex rel THE DEPARTMENT OF INTERIOR and BUREAU OF INDIAN AFFAIRS and HON. CECIL ANDRUS, Secretary of Interior, Director Bureau of Indian Affairs and THE CITY OF TULSA, OKLAHOMA,	)	
Additional Defendants.	)	

O R D E R

THIS CAUSE came on for hearing this 21st day of March, 1977, upon the Additional Defendant City of Tulsa's Motion to Strike and Motion to Dismiss. The Plaintiffs appeard by their attorneys Andrew T. Dalton, Jr., and James Khourie; and the Additional Defendant City of Tulsa appeared by its attorneys Imogene Harris, Assistant City Attorney, and Neal E. McNeill, Jr., Assistant City Attorney. The Court, after examining the pleadings, affidavits, exhibits and briefs and hearing arguments of counsel, finds that the Motion to Strike should be declared moot and the Motion to Dismiss should be sustained because:

(1) The City of Tulsa is neither a proper party plaintiff nor a proper party defendant; and

(2) The Complaint fails to state a cause of action upon which relief can be granted against the City of Tulsa.

IT IS ORDERED AND ADJUDGED that the Motion to Dismiss made by Additional Defendant City of Tulsa is sustained and the Motion to Strike made by the Additional Defendant City of Tulsa is moot.

DATED at Tulsa, Oklahoma, this 22 day of March, 1977.

(Signed) H. Dale Cook
Judge of the United States
District Court for the
Northern District of Oklahoma

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing Order was served upon plaintiffs herein, by placing the same in the United States Mail, first-class postage thereon prepaid, and addressed to said parties as follows:

Andrew T. Dalton, Jr.
Attorney at Law
2536 East 51 Street
Tulsa, Oklahoma 74105

James Khourie
Attorney at Law
2626 East 21 Street
Tulsa, Oklahoma 74114

Chief of Engineering
Department of the Army
ATTN: U.S. District Atty.
333 West Fourth
Tulsa, Oklahoma 74103

Corps of Engineers
c/o James Dwen, Counsel
224 South Boulder
Tulsa, Oklahoma 74103

Bureau of Indian Affairs
Regional Solicitor
333 West Fourth
Tulsa, Oklahoma 74103

Lorayne Hamm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

ADVENT INVESTMENT CORPORATION, Plaintiff,	X	
VS.	X	CIVIL ACTION NO. 76-C-628-C
EQUIVEST, INC., Defendant.	X	

ORDER OF DISMISSAL WITH PREJUDICE

On this day, Plaintiff Advent Investment Corporation ("Advent") and Defendant Equivest, Inc. ("Equivest") presented their joint motion for dismissal with prejudice of the above captioned and numbered cause for the reason that all matters in controversy between the parties herein have been fully compromised and settled, and it appears that dismissal with prejudice is appropriate.

It is therefore, Ordered, Adjudged, and Decreed that:

(a) the above captioned and numbered cause is dismissed with prejudice to the right of Advent to again assert or litigate in any form the claims, demands, or causes of action arising out of the occurrences described in the pleadings herein or which by pleading, amendment, or supplement could have been asserted herein against Equivest;

(b) the above captioned and numbered cause is dismissed with prejudice to the right of Equivest to again assert or litigate in any form the claims, demands, or causes of action arising out of the occurrences described in the pleadings herein or which by pleading, amendment, or supplement could have been asserted herein against Advent; and

(c) that each party shall bear its own costs incurred herein.

Signed, rendered, and entered on 22 of March 1977.

(Signed) H. Dale Cook
United States District Judge

APPROVED AS TO SUBSTANCE
AND FORM:

Richard T. Sonberg
Of SONBERG AND WADDEL
907 Philtower Building
Tulsa, Oklahoma 74103
(918) 583-5985

By Richard T. Sonberg
Attorney for Plaintiff

Gaynell C. Methvin
David P. Seikel
Of HEWETT JOHNSON SWANSON & BARBEE
4700 First International Building
Dallas, Texas 75270
(214) 653-2000

Irvine E. Ungerman
Of UNGERMAN, GRABEL & UNGERMAN
Sixth Floor Wright Building
Tulsa, Oklahoma 74103
(918) 584-6101

By David P. Seikel
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED BANK OF TULSA, a Banking Corporation, and DANIEL WAYNE HOOD, FRANK W. PODPECHAN, W. DEAN HIDY, PAUL E. BAKER, AMOS A. BAKER, II, WARREN A. READ, and KEN E. COX, Organizers of the Proposed HARVARD TOWER BANK, Plaintiffs,	)	
vs.	)	No. 76-C-62-C
ROBERT BLOOM, Acting Comptroller of the Currency of the United States of America, Defendant,	)	
and	)	
BROWN JAMES AKIN, JR., ROGER MORRIS ATWOOD, TED C. BODLEY, JOHN CARSON BUMGARNER, WILLIAM NELSON DAWSON, PAUL DEAN HINCH, JOHN DOUGLAS McCARTNEY, GLENN FRANKLIN PRICHARD, R. JAMES STILLINGS, WAYNE ELWYN SWEARINGEN and TAFT WELCH, Intervenors-Defendants.	)	

O R D E R

This is an action in which plaintiffs challenge the approval by the Comptroller of the Currency (Comptroller) of the application of the proposed Western National Bank (Western) to engage in business as a national banking association in Tulsa, Oklahoma. Plaintiff United Bank of Tulsa is a state banking corporation located some two miles from the proposed location of Western. The individual plaintiffs are organizers of the proposed state banking corporation Harvard Tower Bank (Harvard Tower), which would be located approximately one mile from Western. The organizers of Western are intervenors-defendants in this action. Plaintiffs have abandoned all elements of their causes of action except their allegation that the Comptroller's approval of Western was arbitrary, capricious and an abuse of discretion.

Plaintiffs' primary contention is that the Comptroller failed to adequately consider the possible existence of Harvard Tower as a factor in determining the appropriateness of granting approval to Western's application. Matters to be investigated

by the Comptroller prior to ruling on an application include the following:

(1) The adequacy of the proposed bank's capital structure

(2) The earnings prospects of the proposed bank

(3) The convenience and needs of the community to be served by the proposed bank

(4) The character and general standing in the community of the applicants, prospective directors, proposed officers, and other employees, and other persons connected with the application or to be connected with the proposed bank

(5) The banking ability and experience of proposed officers and other employees. 12 C.F.R. § 4.2(b).

Plaintiffs' objections relate primarily to items (2) and (3) above.

A public hearing on the application of Western was held on June 3, 1975, in the office of the Regional Administrator for the Eleventh National Bank Region in Dallas, Texas. Plaintiffs were represented at that hearing and through those representatives were permitted to examine witnesses and argue their position. At the time of the hearing, the State Banking Board had approved Harvard Tower's application. Prior to the Comptroller's final approval of Western's application on December 10, 1975, the decision of the State Banking Board had been affirmed by the Oklahoma Court of Bank Review. A petition for Certiorari in the Oklahoma Supreme Court was pending on that date and was not denied until March 23, 1976, after the commencement of this action. Plaintiffs object to the Comptroller's consideration of Harvard Tower as "proposed" throughout the course of investigating Western's application and ask this Court to permanently enjoin the Comptroller from issuing a charter to Western. The principal defendant has filed a motion for judgment on the pleadings against the individual plaintiffs, challenging their standing to bring this action. In the alternative, this defendant asks the Court to grant it summary judgment as to all

plaintiffs. The intervenors-defendants have also filed a motion for summary judgment. Plaintiffs have filed cross-motion for summary judgment.

The standards found in Title 5 U.S.C. § 706 govern this Court's review of actions of the Comptroller of the Currency. State Chartered Banks in Washington v. Peoples National Bank of Washington, 291 F.Supp. 180 (W.D. Wash. 1966). Because the Comptroller is not required to hold a hearing or to make formal findings on the record when passing on applications for new banking associations, the "substantial evidence" test of § 706(2)(E) is not applicable. Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed. 2d 106 (1973). The actions of the Comptroller in the instant case are challenged under the standards of § 706(2)(A) as being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Tenth Circuit has characterized this Court's duty under that section as follows:

> "Review under this provision . . . provokes inquiry whether the administrative decisions were based on a consideration of all the relevant factors and whether there was a clear error of judgment (citation omitted). Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency (citation omitted). The court's function is exhausted where a rational basis is found for the agency action taken." Sabin v. Butz, 515 F.2d 1061 1067 (10th Cir. 1975).

The Court has carefully examined the entire record in this case. It appears to the Court that the decision of the Comptroller was based on a consideration of all the relevant factors and that he was aided in his determination by an interpretation of these factors by members of his staff, professional surveys and representatives of the plaintiffs themselves. A similar challenge to a decision of the Comptroller was made in the Western District of Oklahoma in the case of Village Bank v. Smith, 388 F.Supp. 1253 (W.D. Okla. 1975). The holding in that case expresses the conclusion reached by this Court in the instant case:

". . . [W]hile the decision of the Comptroller was indeed a close one, it cannot be said that his action was arbitrary and capricious within the meaning of the statute . . . . On the contrary, the record is replete with support for the decision, and while there is conflicting evidence, none of it is so strong as to warrant a reversal of the Comptroller's decision . . . ." Id. at 1256.

The Court finds that there was a rational basis for the Comptroller's actions and that he did not commit a clear error of judgment. Therefore, the motions for summary judgment of the defendant Comptroller and of the intervenors-defendants are hereby sustained, and the plaintiffs' cross-motion for summary judgment is hereby overruled.

It is so Ordered this 22ND day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERSTATE COMMERCE COMMISSION, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 77-C-81-B
W. K. SPENCE, Defendant	)	

This cause having come on for consideration by the Court upon the sworn Complaint of the plaintiff, the Interstate Commerce Commission, and the defendant W. K. Spence having failed to answer the sworn Complaint or otherwise pleading and such default having been noted upon the docket hereof by the Clerk of the Court, the Court having considered said Complaint, docket, file and default and having made its Findings of Fact and Conclusions of Law now enters the following:

PERMANENT INJUNCTION

That the defendant W. K. Spence, his agents, employees and representatives, and all persons, firms, companies, and corporations, and their respective officers, agents, servants, employees, and representatives, in active concert or participation with him, be perpetually enjoined and restrained from, in any manner or by any device, directly or indirectly, transporting or holding themselves out to transport property, other than exempt and nonregulated commodities, in interstate or foreign commerce by motor vehicle for compensation, on public highways as a for-hire common, or contract carrier by motor vehicle, unless and until such time, if at all, as there is in force with respect to said defendant a certificate of public convenience and necessity or a permit issued by the Interstate Commerce Commission authorizing such transportation.

Done at Tulsa, Oklahoma, this 22nd day of March, 1977.

Allen E. Barrow
Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERSTATE COMMERCE COMMISSION, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 77-C-81-B
W. K. SPENCE, Defendant	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause having come on for consideration by the Court upon the sworn Complaint of the plaintiff, the Interstate Commerce Commission, and the defendant W. K. Spence having failed to answer the sworn Complaint or otherwise pleading and such default having been noted upon the docket hereof by the Clerk of the Court, the Court, upon consideration of said Complaint, docket, file and default, now makes and enters the following:

FINDINGS OF FACT

1. That this suit is brought and the jurisdiction of this Court is invoked under the provisions of Part II of the Interstate Commerce Act, 49 U. S. Code, Section 301 et seq. and particularly 49 U.S.C. 322(b)(1), and under the general laws and rules relating to suits in equity arising under the Constitution and the laws of the United States.

2. That defendant W. K. Spence is an individual conducting his business under the trade name W. K. Transfer Company from facilities located at 329 E. First Street, Tulsa, Oklahoma, and is within the jurisdiction of this Court pursuant to 49 U.S.C. 322(b)(1).

3. That at all times herein mentioned, defendant was and is engaged in the transportation of property as a motor carrier in interstate or foreign commerce by motor vehicle for compensation on public highways between points and places throughout the United States,

including points in the Northern District of Oklahoma within the jurisdiction of this Court and subject to the provisions of Part II of the Interstate Commerce Act, 49 U. S. Code, Section 301 et seq.

4. That on various dates and numerous occasions, the defendant has been and is holding himself out to transport and has transported, by motor vehicle, trailers, containing carpeting, commercial fertilizer, meal and flour in "TOFC" (trailer on flat car) service between Tulsa and various other points in Oklahoma, each shipment having a prior or subsequent interstate movement by common carrier railroad.

5. That at all times herein mentioned, there was not in force and there is not now in force with respect to defendant a certificate of public convenience and necessity, or a permit, or any other authority issued by the Interstate Commerce Commission authorizing the transportation and operations herein described.

6. Unless restrained by this Court, the defendant will continue to transport property as a motor carrier in interstate or foreign commerce by motor vehicle on public highways between points in the United States for compensation, without first having obtained from the plaintiff a certificate of public convenience and necessity or a permit or any other form of authority authorizing him to engage in such transportation as aforesaid.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this action by virtue of the provisions of Title 49, Section 322(b)(1), U. S. Code and under the general laws and rules relating to suits in equity arising under the Constitution and laws of the United States.

2. That the transportation heretofore and now being performed by defendant of nonexempt property by motor vehicle over public highways in interstate commerce constitutes violations of 49 U.S.C. 303(c), 306(a), or 309(a) and as such are subject to be enjoined by this Court on the application and suit of plaintiff under the express provisions of 49 U.S.C. 322(b)(1).

3. That the relief prayed for should be granted.

Done at Tulsa, Oklahoma, this 22nd day of March, 1977.

Allen E. Barrow
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSE FIOL,

Plaintiff,

vs.

No. 76-C-504-B

HILLCREST MEDICAL CENTER,

Defendant.

DISMISSAL WITHOUT PREJUDICE

Comes now the Plaintiff, Jose Fiol, and dismisses this his cause of action against Hillcrest Medical Center without prejudice to the filing of any subsequent action.

DATED at Tulsa, Oklahoma, this 14th day of March, 1977.

JOSE FIOL, Plaintiff

APPROVED:

KENNETH L. STAINER, Court-appointed
Attorney for Plaintiff, Jose Fiol

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DALLAS COY OWENS,

Plaintiff,

vs.

CITY OF TULSA, et al.,

Defendants.

76-C-266-B

ORDER

The Court has for consideration the Motion to Reconsider filed by the plaintiff, the briefs in support and opposition thereto, and, being fully advised in the premises, finds that said Motion should be overruled.

IT IS, THEREFORE, ORDERED that the Motion to Reconsider filed by the plaintiff be and the same is hereby overruled.

ENTERED this 21st day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM M. McKILLOP,)
)
Plaintiff,)
)
vs.) No. 76-C-379-C
)
EDWARD CROWELL,)
)
Defendant.)

ORDER OF DISMISSAL

The Court, upon the parties' announcement of settlement in open court on March 14, 1977, and upon the filing of the joint Stipulation of settlement,

FINDS that all issues and controversies between the parties arising out of the allegations of the Complaint have been compromised and settled in full, and therefore it is

ORDERED that the above captioned matter be, and it hereby is dismissed with prejudice this 21st day of March, 1977.

/s/ H. Dale Cook
United States District Judge

APPROVED:

N. Franklyn Casey
Attorney for Plaintiff

Doerner, Stuart, Saunders,
Daniel & Langenkamp

By
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY OLIVER,

Plaintiff,

vs.

TRANSPORTATION WORKERS UNION OF AMERICA, AFL-CIO LOCAL 514 and AMERICAN AIRLINES, INC., a foreign corporation,

Defendants.

76-C-397-B

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, Transportation Workers Union of America, AFL-CIO Local 514, the briefs in support and opposition thereto, and, having carefully perused the entire file, and being fully advised in the premises, finds:

The Motion to Dismiss is premised on two grounds, i.e., failure to state a claim and lack of jurisdiction.

The Court hereby adopts the order entered by it on December 9, 1976, sustaining the Motion to Dismiss filed by the defendant, American Airlines, Inc., as fully as set forth at length in this order and attaches a copy of said order as Exhibit "A" hereto for ready reference.

The Court additionally notes that in its Responsive Brief filed on December 30, 1976, the plaintiff asks the Court on page 3 of said brief to reconsider the Court's ruling, but no formal motion to reconsider has ever been filed by the plaintiff.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant, Transportation Worker's Union of America, AFL-CIO Local 514 be and the same is hereby sustained, and this

cause of action and complaint are hereby dismissed as to the defendant, Transportation Workers Union of America, AFL-CIO Local 514.

ENTERED this 21st day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JERRY OLIVER,

Plaintiff,

vs.

TRANSPORTATION WORKER'S UNION OF AMERICA, AFL-CIO LOCAL 514, and AMERICAN AIRLINES, INC., a foreign corporation,

Defendants.

76-C-397-B

FILED

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Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, American Airlines, Inc., the briefs in support and opposition thereto, the Court limiting the determination to pleadings and briefs and not considering extraneous material which would require the Court to convert said Motion to a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and, having carefully perused the pleadings and briefs and being fully advised in the premises, finds:

Two grounds are raised in support of the Motion to Dismiss, i.e, that the complaint fails to state a claim upon which relief can be granted as to American Airlines and that the Court is without jurisdiction.

American Airlines is engaged in the business of airplane passenger service in interstate commerce. Plaintiff was first employed by defendant company as an aircraft mechanic in February of 1966. On May 27, 1974, a collective bargaining agreement was entered into between the defendants, which was in full force and effect at all pertinent times hereto. Plaintiff alleges that prior to January 9, 1975, the company attempted to discharge him and that on January 9, 1975, the company and union entered into the following agreement:

"(1) Dismissal for continued unsatisfactory attendance under the Company's policy will have no appeal to the

17.

EXHIBIT "A"

> Area Board; (2) Reinstate with full seniority and benefits but with no back pay for time lost; (3) Report immediately on Monday, January 13, 1975 afternoon shift for work."

Plaintiff returned to work January 13, 1975 and was so employed until December 31, 1975, when he was discharged by the defendant company by a notice of discharge which stated:

> "On 9-30-74 you were discharged for continuing unsatisfactory attendance. You appealed this discharge action with your appeal subsequently docketed as Case M-2371-74 before the Tulsa Area Board of Adjustment. On 1-09-75 during the presentation of the case the Company and Union conferred and on 1-10-75 agreed to settle your appeal bilateraly to the effect: Number One, dismissal for continued unsatisfactory attendance under the Company's policy will have no appeal to the Area Board. Two, reinstated with full seniority and benefits but with no back pay for time lost. Number three, report immediately on Monday, January 13, 1975, afternoon shift work. The Company fulfilled their commitment however, in reviewing your attendance record since reinstatement you have failed to correct your unsatisfactory attendance record. Based on your continuing unsatisfactory attendance record you are hereby terminated from employment with American Airlines, Inc., effective your last day worked 12-31-75. "

In his complaint the plaintiff alleges that he filed a grievance with the local union through the proper steps as outlined in the "agreement" and a grievance hearing was held April 7, 1976, before the Area Board of Adjustment, Tulsa, Oklahoma, to determine if plaintiff's dismissal was proper.

The defendant, American Airlines, Inc. is a "carrier by air" as defined by Title 45 USC §181, thus bringing the instant dispute within the scope of Title 42 USC §151, et seq.

In Rosen v. Eastern Air Lines, Inc., 400 F.2d 462, (5th Cir. 1968), cert. denied 394 U.S. 959, rhrg. denied 395 U.S. 917, it was stated:

> "***In Gunther v. San Diego and Arizona Eastern Ry., 382 U.S. 257 (1965), with respect to rev iewability of awards made under the Railway Labor Act, 45 U.S.C.A. §151 et seq., said the following:
>
> "'This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment Board.
>
> "'The basic grievance here--that is, the complaint that petitioner has been wrongfully removed from active service as an angineer because of health--has been finally, completely, and irrevocably

settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court, 382 U.S. 263-264.'

"This Court has consistently followed Gunther in holding that district courts have no authority to review the System Board's awards. See Southern Pacific Company v. Wilson, 378 F.2d 533 (5 Cir. 1967); Hodges v. Atlantic C.L.R. Co., 363 F.2d 534 (5 Cir. 1966); and Rittle v. REA Express, 367 F.2d 578 (5 Cir. 1966). There are, however, very limited situations in which following the actions of a system board, authorized by the Railway Labor Act (supra), court review is available. Southern Pacific Company v. Wilson, supra, and Edwards v. St. Louis-San Francisco Railroad Company, 361 F.2d 946 (7 Cir. 1966).

"The actions of the System Board twoards the appellants do not reveal any evidence of a denial of fundamental or 'industrial' due process which would invest a federal court with authority to review the action of that Board. For such authority to exist, there must be a sufficient denial of due process to allow a collateral attack on the jurisdiction of the System Board. Woolley v. Eastern Air Lines, 250 F.2d 86 (5 Cir. 1957).

"It is the voluntary act of the employee which gives the actions of the System Board such final authority. Upon his discharge, an employee has a choice--he may sue in court for a breach of contract of employment, or he can proceed under the agreement and the Railway Labor Act before the Board. He may not do both. Hence, 'granted jurisdiction in the Board, its decisions on either factual or legal or mixed issues, are not reviewable in court.' Woolley v. Eastern Air Lines, supra."

In Rossi v. Trans World Airlines, 350 F.Supp. 1263, at 1272 (USDC, C.D.Calif., 1972), the Court said:

"***However, this Court does not have the power to review the decisions of a system adjustment board. Rosen v. Eastern Air Lines, Inc., 400 F.2d 462 (5th Cir. 1968) cert.denied, 394 U.S. 959 (1968). There the court mentioned, at 464, 'It is the voluntary act of the employee which gives the actions of the System Board such final authority. Upon his discharge, an employee has a choice--he may sue in court for a breach of contract of employment, or he can proceed under the agreement and the Railway Labor A-t before the Board. He may not do both. Hence, 'granted jurisdiction in the Board, its decisions on either factual or legal or mixed issues, are not reviewable in court.' ***."

The Court went on to say:

"Only a limited number of situations exist where judicial review of a system board is possible. These arise only where there has been a denial of due process by some act of the Board. Rosen v. Eastern Air Lines, supra; Farris v. Alaska Airlines, supra, 113 F.Supp. at 909. Farris goes on to say that the court's inquiry ends once we find 1) the board's procedure and award conformed to the statute and the agreement, 2) the award confined itself to the letter of submission and 3) the award was not arrived at by fraud or corruption.

> Other courts have limited judicial review even more severely. In Bower v. Eastern Airlines, supra, the court stated that the District Court's inquiry into the due process issue only required that the court 'determine whether the Board had given the plaintiff a full and fair hearing and had exercised its honest judgment in reaching its conclusions and decision on the full record.'"

The Court has perused with interest the case relied on by the plaintiff in his most recent brief, i.e. Hines v. Anchor Motor Freight, No. 74-1025 (decided March 2, 1976) 44 LW 4299. That action was brought pursuant to the Labor Management Relation Act, 29 U.S.C. §185. The Court notes that plaintiff has invoked this section in its original complaint.

The Court finds, however, as stated hereinabove, the defendant company is a "carrier by air" as defined by Title 42 USC §181, thus bringing the dispute within the scope of Title 42 USC §151, et seq.

The Railway Labor Act was enacted in 1926 in order to promote the prompt and orderly settlement, by agreement or arbitration, of labor controversies between interstate carriers and their employees, and in 1936 was extended to apply to carriers by air.

Neither the National Labor Relations Act nor the Labor-Management Relations Act is applicable to railway labor disputes, which are governed exclusively by the Railway Labor Act.

In 48 Am.Jur.2d §1140 it is stated:

> "Where an employee claims that he has been unlawfully discharged, he may proceed either in accordance with the administrative procedures of the Railway Labor Act, or he may bring an action at law for unlawful discharge. He may not do both, ***."

Based on the above, the Court finds that the Motion to Dismiss of the defendant, American Airlines, Inc. should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant, American Airlines, Inc. be and the same is hereby sustained, and this cause of action and complaint are

dismissed as to the defendant, American Airlines, Inc.

ENTERED this 9th day of December, 1976.

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEEL ENTERPRISES, INC., a Texas corporation, Plaintiff,	)	
vs.	)	No. 77-C-44-B
KECK STEEL CORPORATION, an Oklahoma corporation, Defendant.	)	

JUDGMENT

NOW on this 18th day of March, 1977, came on for hearing the Motion for Default Judgment filed in the above-entitled cause by the Plaintiff, STEEL ENTERPRISES, INC. The Court having reviewed the records and pleadings filed herein and deliberation having been had, finds that the Defendant, KECK STEEL CORPORATION, is in default ~~and that the default has been entered by the Clerk~~, and finds that the Defendant, KECK STEEL CORPORATION, is indebted to the Plaintiff, STEEL ENTERPRISES, INC., in the sum of $20,944.95, together with interest thereon at the rate of ten percent (10%) per annum from the date hereof until such judgment be paid in full, a reasonable attorneys' fee in the amount of $1500.00, and the costs of this action in the amount of $18.00.

Allen E. Barrow

JUDGE OF THE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VIRGIL F. AKINS and PAULINE F. AKINS, Husband and Wife,	)	
Plaintiffs,	)	75-C-537-B
vs.	)	
TULSA URBAN RENEWAL AUTHORITY, A Public Body Corporate, and CARLA HILL, Director of Department of Housing and Urban Development,	)	
Defendants.	)	

ORDER

The Court has for consideration the Motion for New Trial filed by the plaintiffs, the brief and affidavit in support thereto, and the briefs in opposition thereto, and, being fully advised in the premises, finds:

That an Order Nunc Pro Tunc should be entered to change the word "furnished" to "unfurnished" in the pre-trial order.

That the Motion for New Trial should be overruled.

IT IS, THEREFORE, ORDERED NUNC PRO TUNC THAT the word "furnished" be changed to "unfurnished" in the pre-trial order.

IT IS FURTHER ORDERED that the Motion for New Trial be and the same is hereby overruled.

ENTERED this 21st day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

JEROME NEY, JR. *

V. * NO. 76-C-275

AUTOPILOTS CENTRAL, INC. *

* *

ORDER

BE IT REMEMBERED that on this the 21st day of March, 1977, there came before the Court for consideration the motion by plaintiff herein for new trial. The Court having carefully considered the same, it is

ORDERED, ADJUDGED AND DECREED that plaintiff's motion for new trial be and is hereby GRANTED.

RENDERED, ENTERED AND SIGNED this 21st day of March, 1977.

H. Dale Cook
JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MATTHEW WILLIAMS, ERIA GEAN WILLIAMS, COUNTY TREASURER, Tulsa County, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Defendants.	)	CIVIL ACTION NO. 76-C-489-C

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 18th day of March, 1977, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, appearing by Gary J. Summerfield, Assistant District Attorney; and the Defendants, Matthew Williams and Eria Gean Williams, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Matthew Williams and Eria Gean Williams, were served by publication, as appears from the Proof of Publication filed herein; and that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were served with Summons, Complaint, and Amendment to Complaint on November 10, 1976, as appears from the U.S. Marshals Service herein.

It appearing that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, have duly filed their Answers herein on November 29, 1976; that Defendants, Matthew Williams and Eria Gean Williams, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Nineteen (19), Block Forty (40), VALLEY VIEW ACRES SECOND ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Matthew Williams and Eria Gean Williams, did, on the 9th day of March, 1974, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,500.00 with 8 1/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Matthew Williams and Eria Gean Williams, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,450.70 as unpaid principal with interest thereon at the rate of 8 1/4 percent per annum from December 1, 1975, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Matthew Williams and Eria Gean Williams, the sum of $ —0— plus interest according to law for personal property taxes for the year(s) _____ and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Matthew Williams and Eria Gean Williams, in rem, for the sum of $9,450.70 ith interest thereon at the rate of 8 1/4 percent per annum from

December 1, 1975, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Matthew Williams and Eria Gean Williams, for the sum of $ -0- as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

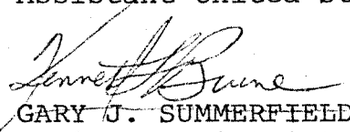
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney



GARY J. SUMMERFIELD
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 76-C-593-C
	)	
	)	
OTHA R. WALKER, ARTELLIA B. WALKER, COUNTY TREASURER, Tulsa County, and BOARD OF COUNTY COMMISSIONERS, Tulsa County,	)	
	)	
Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 18th day of March, 1977, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, appearing by Marvin E. Spears, Assistant District Attorney; and the Defendants, Otha R. Walker and Artellia B. Walker, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, were served with Summons and Complaint on November 3, 1976; that Defendant, Otha R. Walker, was served with Summons and Complaint on December 7, 1976, all as appears from the U.S. Marshals Service herein; and that Defendant, Artellia B. Walker, was served by publication, as appears from the Proof of Publication filed herein.

It appearing that Defendants, County Treasurer, Tulsa County, and Board of County Commissioners, Tulsa County, have duly filed their Answers herein on December 22, 1976; that Defendants, Otha R. Walker and Artellia B. Walker, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Thirteen (13), Block Three (3), HARTFORD HILLS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Otha R. Walker and Artellia B. Walker, did, on the 29th day of November, 1974, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $7,600.00 with 9 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Otha R. Walker and Artellia B. Walker, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $7,578.74 as unpaid principal with interest thereon at the rate of 9 1/2 percent per annum from March 1, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Johnny and Alice Bush, former owners, the sum of $ 36.88 plus interest according to law for personal property taxes for the year(s) 1975-76 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Otha R. Walker, in personam, and Artellia B. Walker, in rem, for the sum of $7,578.74 with interest thereon at the rate of 9 1/2 percent

per annum from March 1, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Johnny and Alice Bush, former owners, for the sum of $ 36.88 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED

ROBERT P. SANTEE
Assistant United States Attorney

Kenneth Bruner

~~MARVIN E. SPEARS~~
Assistant District Attorney
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JANET K. MILLS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CANAL INSURANCE COMPANY,	)	
	)	
Defendant.	)	NO. 76 - C - 546

O R D E R

This matter comes on for consideration before me, the undersigned Judge, this 18th day of March, 1977, upon Plaintiff's Application to dismiss this cause; and the Court, having examined the files and records herein and being fully advised in the premises, finds that said request should be allowed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's request to dismiss this cause is hereby granted.

JUDGE OF THE U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff,	)	
vs.	)	No. 76-C-30-C
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, Defendant.	)	

AMENDED ORDER

This action is brought by the plaintiff, Charlotte Meier Young in person and as assignee in trust for her minor sons, claiming entitlement to the proceeds of an insurance policy issued by the defendant, Fidelity Union Life Insurance Company, to her son, Thomas Alexander Young, who died on February 14, 1975. The defendant admits the policy was issued to the deceased but denies that the policy was in full force and effect on the date of death and alleges that said policy had lapsed for non-payment of premiums.

The plaintiff and the defendant have each filed a Motion for Summary Judgment, have fully briefed the issues presented, and have submitted affidavits and depositions in support and in opposition to said motions. After a careful consideration of the matters presented and the law applicable thereto, the Court makes the following determination.

The parties are in agreement in regard to the following facts. On September 16, 1974, the decedent made, executed and delivered an application for insurance to the defendant company in Dallas, Texas. On that same date, decedent paid, by a money order, the first premium of $30.05 on the subject insurance policy. Thereafter, on September 18, 1974 a policy was issued

by the defendant's home office. By a check dated November 18, 1974, a further premium in the amount of $30.05 was paid by the insured's mother on his behalf. The initial payment made on September 16, 1974 and the one of November 18, 1974 are the only two premiums paid in regard to this policy. It appears the insurance policy was sent to the insured's mother in December, 1974, and she thereafter handed it to the insured on December 22, 1974.

Defendant contends that under the applicable language of the insurance application and the conditional receipt given to the insured on September 16, 1974, the policy became effective as of the date of the application, September 16, 1974. Accordingly, defendant asserts that since only two monthly premiums were ever paid, the policy was in effect for only two months from September 16, 1974, with an additional 31-day grace period extending coverage to December 19, 1974, and that the policy lapsed 57 days prior to the death of the insured. Plaintiff, on the other hand, contends that the provisions of the insurance application require that the policy be "manually delivered" before defendant is liable under the policy. Plaintiff asserts, therefore, that the policy did not become effective until December, 1974, when the policy was "manually delivered" and that the insured was covered for the succeeding two months plus the 31-day grace period in which event he was covered by the policy at the time of his death on February 14, 1975.

The insurance application, signed by the insured, provides:

> "I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid. If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules

> and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this date or the date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt."

In regard to this provision, plaintiff contends that the two sentences which comprise the paragraph are totally inconsistent. In order to determine the effective date of the insurance, the Court must also look to the provisions of the policy itself. The policy issued to the insured provides that the "policy, together with the application herefor . . . constitute the entire contract." The intention of the parties to a contract must be deduced from the entire agreement and every part must be construed together. Hardberger & Smylie v. Employers Mutual Liability Insurance Company of Wisconsin, 444 F.2d 1318 (10th Cir. 1971); Simmons v. Fariss, 289 P.2d 372 (Okla. 1955). In regard to the effective date of the policy, the policy provides:

> "If the full premium is not paid at the time Part 1 of the application herefor is signed, this policy shall not become effective until the first premium has been paid and the policy actually delivered to the Insured while the state of health of the person proposed for insurance is as stated in the application; provided, however, that upon such delivery it shall relate back and take effect as of the date of issue. If the full premium hereon is paid at the time application is made, then if approved at the Home Office of the Company exactly as applied for, the policy shall be dated and take effect as of the date of the application." (emphasis added)

The Court does not take issue with the authorities cited by plaintiff to the effect that if a policy of insurance is susceptible of two constructions that the one most favorable to the insured should be adopted. However, as stated in Hercules Casualty Insurance Company v. Preferred Risk Insurance Company, 337 F.2d 1 (10th Cir. 1964) while "insurance policies, of course, should be interpreted favorably to the insured where equivocal or ambiguous language permits a selective judgment . . . the court

cannot resolve ambiguity if none exists and . . . an insurance policy may not be reconstructed to import meanings contrary to the obvious intention of the parties." The Court finds no ambiguity or inconsistency in the provisions of the application and policy in regard to the effective date of the policy. In construing a contract of insurance, the terms and words, if unambiguous, must be accepted in their plain, ordinary and popular sense. Clearly, the first sentence in the application merely sets out the general prerequisites to liability and the second sentence modifies the general provision and is applicable in the event the specific criteria set out in the second sentence are met. In other words, as provided in the policy, if the initial premium is not paid at the time application is made, the policy shall take effect as of the date of the application. This interpretation is further supported by the provisions of the Conditional Receipt which is given an insured at the time of making application and an initial payment. The Conditional Receipt reads:

> "1. This payment is made and accepted subject to the following conditions: (1) if settlement for the first full premium is made at the time of making this part of the application and (2) if on that date Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office insurable and acceptable under the Company's rules and practices for the policy in the amount, on the plan, and otherwise exactly as applied for; and if both conditions are met then the insurance shall be effective from date of this application, or the date of the last of any medical examinations or aviation or occupational questionnaires required by the company in connection with this application, if later."

Plaintiff further contends that the Home Office did not approve the application exactly as applied for and that therefore the policy was not immediately effective. The Court has examined the terms and provisions as set out in the application and as provided in the policy that was issued and finds no significant variation. The only discrepancy appears to be based upon the fact that the underwriter made a $ .10 error in the amount of

annual premiums which resulted in the monthly premium being $30.05 rather than $30.06. The Court finds that in essence the application was approved by the Home Office exactly as applied for.

Plaintiff further asserts that the presentation by the insurer to the insured of a Conditional Receipt bearing the same number as the application is a prerequisite to the policy taking immediate effect. As stated, the application states: "If the full first premium is paid at the time of the application and in exchange for the Conditional Receipt bearing the same number as this application . . . then the insurance shall be effective from this date . . . ." In this portion of the sentence, the basic condition precedent to the policy taking immediate effect is the payment of the first full premium. The giving of a receipt in exchange for the payment inures to the benefit of the insured. Certainly an insurer would be hard-put to contend that the policy is not in effect after the payment of the initial premium based upon the company's failure to furnish the insured a conditional receipt. The determinative factor on this issue, however, is that no such requirement is stated in the insurance policy itself. As previously stated, in this regard the policy merely provides: "If the full premium hereon is paid at the time application is made. . . the policy shall . . . take effect as of the date of the application." The intention of the parties to this contract must be deduced from the entire agreement and the application and policy must be construed together. It appears to the Court that the provisions of the application and the policy in regard to the effect of a conditional receipt are not inconsistent. However, if any inconsistency exists, the provisions of the policy control. Aetna Life Insurance Co. v. Phillips, 69 F.2d 901 (10th Cir. 1934). It is therefore the determination of the Court that the effective date of the policy is not contingent upon the furnishing or receiving of a conditional receipt.

Plaintiff also alleges that defendant is estopped from denying coverage due to its action of delivering the policy in December, after defendant now contends the policy lapsed. In this regard, plaintiff asserts that the insured reasonably believed the policy was not effective until "manually delivered" in light of the fact that it was transmitted to him in December. The Court finds, however, that a reading of the policy should clearly have indicated to the insured that it had become effective in September. Furthermore, on January 3, 1975 the company wrote the insured and stated therein: "Premiums on your policy are paid to November 18, 1974." Again on February 5, 1975 the defendant wrote to the insured informing him: "Your policy is in a lapsed condition and when you complete the enclosed application for reinstatement form, we will be plased to consider reinstating your policy." The Court finds that defendant's actions were not intended to and did not mislead the insured and that no reasonable reliance could be shown to warrant the application of estoppel.

Plaintiff also asserts that "the application language relied on by defendant is at best an illusory promise for temporary insurance which lacks consideration and mutuality of obligation by both parties." The plaintiff bases this assertion upon the language in the paragraph previously quoted from the application which provides ". . . if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules and practices . . ." then the policy would be effective. The Court does not find that the contract between the parties was illusory or without consideration. As stated in 43 Am.Jur.2d § 220:

> "Although life, health, and accident insurance is still often written to take effect on delivery of the policy, it is very common for agents, on payment of the initial premium, to give "binding receipts" or "conditional receipts," which recite that the insurance takes effect from an earlier

> date, such as the date of the receipt or the date of the medical examination, provided the application is approved and accepted at the home office of the insurer." . . .
>
> ". . . In other cases, mostly of recent origin, it has been held that a receipt stating that the insurance shall be in force from its date provided the application is approved and accepted at the home office of the insurer is effective in providing protection to the applicant until the application is approved, on the grounds of an assumed intention of the parties to this effect."

Furthermore, in the case at bar, prior to the insured's death, the insured had paid two premiums and the defendant company had approved the issuance of the policy on September 18, 1974. The contract was binding and did not lack mutual consideration.

It is therefore the determination of the Court that the defendant was liable under the insurance policy from the date of application and that said policy had lapsed prior to the time of the insured's death. Based upon this determination, plaintiff's Motion for Summary Judgment is hereby overruled and defendant's Motion for Summary Judgment is hereby sustained.

It is so Ordered this 18th day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and DON TIBBETTS, Revenue Officer, Internal Revenue Service, Petitioners,	)	
vs.	)	No. 77-C-43-B ✓
JESSE B. RENICK, Respondent.	)	

FILED
MAR 17 19[illegible]
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 17th day of March, 1977, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon him November 5, 1976, that further proceedings herein are unnecessary and that the Respondent, Jesse B. Renick, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Jesse B. Renick, be and he is hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed.

Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED:

Kenneth P. Snoke
KENNETH P. SNOKE
Assistant United States Attorney

JUDGMENT ON JURY VERDICT — CIV 31 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

Richard L. Hudson,

Plaintiff,

vs.

Swan Engineering & Supply Company, Inc., a Kansas Corp., Sealco, Inc., an Oklahoma Corp., H. A. Smith and Eugene P. Mitchell,

Defendants.

CIVIL ACTION FILE NO. 75-C-151-B

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Allen E. Barrow, , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that having found in favor of the Plaintiff and against the defendants assesses damages in the sum of $200,000.00.

Dated at Tulsa, Oklahoma, this 17th day of March, 19 77 .

Jack C. Silver
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLOTTE MEIER YOUNG, in person and as Assignee in trust for her minor sons, Norbert Nelson and Ulrich Waldemar Young, Plaintiff,	)	
vs.	)	Co. 76-C-30-C
FIDELITY UNION LIFE INSURANCE COMPANY, a stock company, Dallas, Texas, Defendant.	)	

FILED
MAR 17 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This action is brought by the plaintiff, Charlotte Meier Young in person and as assignee in trust for her minor sons, claiming entitlement to the proceeds of an insurance policy issued by the defendant, Fidelity Union Life Insurance Company, to her son, Thomas Alexander Young, who died on February 14, 1975. The defendant admits the policy was issued to the deceased but denies that the policy was in full force and effect on the date of death and alleges that said policy had lapsed for non-payment of premiums.

The plaintiff and the defendant have each filed a Motion for Summary Judgment, have fully briefed the issues presented, and have submitted affidavits and depositions in support and in opposition to said motions. After a careful consideration of the matters presented and the law applicable thereto, the Court makes the following determination.

The parties are in agreement in regard to the following facts. On September 16, 1974, the decedent made, executed and delivered an application for insurance to the defendant company in Dallas, Texas. On that same date, decedent paid, by a money order, the first premium of $30.05 on the subject insurance policy. Thereafter, on September 18, 1974 a policy was issued by the defendant's home office. By a check dated November 18, 1974, a further premium in the amount of $30.05 was paid by the

5A

insured's mother on his behalf. The initial payment made on September 16, 1974 and the one of November 18, 1974 are the only two premiums paid in regard to this policy. It appears the insurance policy was sent to the insured's mother in December, 1974, and she thereafter handed it to the insured on December 22, 1974.

Defendant contends that under the applicable language of the insurance application and the conditional receipt given to the insured on September 16, 1974, the policy became effective as of the date of the application, September 16, 1974. Accordingly, defendant asserts that since only two monthly premiums were ever paid, the policy was in effect for only two months from September 16, 1974, with an additional 31-day grace period extending coverage to December 19, 1974, and that the policy lapsed 57 days prior to the death of the insured. Plaintiff, on the other hand, contends that the provisions of the insurance application require that the policy be "manually delivered" before defendant is liable under the policy. Defendant asserts, therefore, that the policy did not become effective until December, 1974, when the policy was "manually delivered" and that the insured was covered for the succeeding two months plus the 31-day grace period in which event he was covered by the policy at the time of his death on February 14, 1975.

The insurance application, signed by the insured, provides:

> "I agree that there shall be no liability hereunder until a policy shall be issued and manually delivered while the state of health of the Proposed Insured is as stated in this application and the first premium actually paid. If the full first premium is paid at the time of this application and in exchange for the Conditional Receipt bearing the same number as this application and if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules and practices for the policy, in the amount, on the plan, and otherwise exactly as applied for, then the insurance shall be effective from this

> date or the date of the last of any medical examinations or questionnaires required by the Company, if later, subject to the terms of the policy applied for and of the Conditional Receipt."

In regard to this provision, defendant contends that the two sentences which comprise the paragraph are totally inconsistent. In order to determine the effective date of the insurance, the Court must also look to the provisions of the policy itself. The policy issued to the insured provides that the "policy, together with the application herefor . . . constitute the entire contract." The intention of the parties to a contract must be deduced from the entire agreement and every part must be construed together. Hardberger & Smylie v. Employers Mutual Liability Insurance Company of Wisconsin, 444 F.2d 1318 (10th Cir. 1971); Simmons v. Fariss, 289 P.2d 372 (Okla. 1955). In regard to the effective date of the policy, the policy provides:

> "If the full premium is not paid at the time Part 1 of the application herefor is signed, this policy shall not become effective until the first premium has been paid and the policy actually delivered to the Insured while the state of health of the person proposed for insurance is as stated in the application; provided, however, that upon such delivery it shall relate back and take effect as of the date of issue. If the full premium hereon is paid at the time application is made, then if approved at the Home Office of the Company exactly as applied for, the policy shall be dated and take effect as of the date of the application." (emphasis added)

The Court does not take issue with the authorities cited by plaintiff to the effect that if a policy of insurance is susceptible of two constructions that the one most favorable to the insured should be adopted. However, as stated in Hercules Casualty Insurance Company v. Preferred Risk Insurance Company, 337 F.2d 1 (10th Cir. 1964) while "insurance policies, of course, should be interpreted favorably to the insured where equivocal or ambiguous language permits a selective judgment . . . the court cannot resolve ambiguity if none exists and . . . an insurance policy may not be reconstructed to import meanings contrary to the

obvious intention of the parties." The Court finds no ambiguity or inconsistency in the provisions of the application and policy in regard to the effective date of the policy. In construing a contract of insurance, the terms and words, if unambiguous, must be accepted in their plain, ordinary and popular sense. Clearly, the first sentence in the application merely sets out the general prerequisites to liability and the second sentence modifies the general provision and is applicable in the event the specific criteria set out in the second sentence are met. In other words, as provided in the policy, if the initial premium is not paid at the time application is made, the policy is not effective until it has been paid and the policy delivered. If the full premium is paid at the time application is made, the policy shall take effect as of the date of the application. This interpretation is further supported by the provisions of the Conditional Receipt which is given an insured at the time of making application and an initial payment. The Conditional Receipt reads:

> "1. This payment is made and accepted subject to the following conditions: (1) if settlement for the first full premium is made at the time of making this part of the application and (2) if on that date Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office insurable and acceptable under the Company's rules and practices for the policy in the amount, on the plan, and otherwise exactly as applied for; and if both conditions are met then the insurance shall be effective from date of this application, or the date of the last of any medical examinations or aviation or occupational questionnaries required by the company in connection with this application, if later."

Defendant further contends that the Home Office did not approve the application exactly as applied for and that therefore the policy was not immediately effective. The Court has examined the terms and provisions as set out in the application and as provided in the policy that was issued and finds no significant variation. The only discrepancy appears to be based upon the fact that the underwriter made a $ .10 error in the amount of annual premiums which resulted in the monthly premium being

$30.05 rather than $30.06. The Court finds that in essence the application was approved by the Home Office exactly as applied for.

Defendant further asserts that the presentation by the insurer to the insured of a Conditional Receipt bearing the same number as the application is a prerequisite to the policy taking immediate effect. As stated, the application states: "If the full first premium is paid at the time of the application and in exchange for the Conditional Receipt bearing the same number as this application . . . then the insurance shall be effective from this date . . . ." In this portion of the sentence, the basic condition precedent to the policy taking immediate effect is the payment of the first full premium. The giving of a receipt in exchange for the payment inures to the benefit of the insured. Certainly an insurer would be hard-put to contend that the policy is not in effect after the payment of the initial premium based upon the company's failure to furnish the insured a conditional receipt. The determinative factor on this issue, however, is that no such requirement is stated in the insurance policy itself. As previously stated, in this regard the policy merely provides: "If the full premium hereon is paid at the time application is made . . . the policy shall . . . take effect as of the date of the application." The intention of the parties to this contract must be deduced from the entire agreement and the application and policy must be construed together. It appears to the Court that the provisions of the application and the policy in regard to the effect of a conditional receipt are not inconsistent. However, if any inconsistency exists, the provisions of the policy control. Aetna Life Insurance Co. v. Phillips, 69 F.2d 901 (10th Cir. 1934). It is therefore the determination of the Court that the effective date of the policy is not contingent upon the furnishing or receiving of a conditional receipt.

Defendant also alleges that defendant is estopped from denying coverage due to its action of delivering the policy in December,

after defendant now contends the policy lapsed. In this regard, defendant asserts that the insured reasonably believed the policy was not effective until "manually delivered" in light of the fact that it was transmitted to him in December. The Court finds, however, that a reading of the policy should clearly have indicated to the insured that it had become effective in September. Furthermore, on January 3, 1975 the company wrote the insured and stated therein: "Premiums on your policy are paid to November 18, 1974." Again on February 5, 1975 the defendant wrote to the insured informing him: "Your policy is in a lapsed condition and when you complete the enclosed application for reinstatement form, we will be pleased to consider reinstating your policy." The Court finds that defendant's actions were not intended to and did not mislead the insured and that no reasonable reliance could be shown to warrant the application of estoppel.

Defendant also asserts that "the application language relied on by defendant is at best an illusory promise for temporary insurance which lacks consideration and mutuality of obligation by both parties." The defendant bases this assertion upon the language in the paragraph previously quoted from the application which provides ". . . if on that date the Proposed Insured was, in the opinion of the Company's authorized officers at its Home Office, insurable and acceptable under the Company's rules and practices . . ." then the policy would be effective. The Court does not find that the contract between the parties was illusory or without consideration. As stated in 43 Am.Jur.2d § 220:

> "Although life, health, and accident insurance is still often written to take effect on delivery of the policy, it is very common for agents, on payment of the initial premium, to give "binding receipts" or "conditional receipts," which recite that the insurance takes effect from an earlier date, such as the date of the receipt or the date of the medical examination, provided the application is approved and accepted at the home office of the insurer." . . .

". . . In other cases, mostly of recent origin, it has been held that a receipt stating that the insurance shall be in force from its date provided the application is approved and accepted at the home office of the insurer is effective in providing protection to the applicant until the application is approved, on the grounds of an assumed intention of the parties to this effect."

Furthermore, in the case at bar, prior to the insured's death, the insured had paid two premiums and the defendant company had approved the issuance of the policy on September 18, 1974. The contract was binding and did not lack mutual consideration.

It is therefore the determination of the Court that the defendant was libel under the insurance policy from the date of application and that said policy had lapsed prior to the time of the insured's death. Based upon this determination, plaintiff's Motion for Summary Judgment is hereby overruled and defendant's Motion for Summary Judgment is hereby sustained.

It is so Ordered this 17th day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CERTAIN-TEED PRODUCTS CORPORATION, a corporation,	)	
Plaintiff,	)	
vs.	)	
E. B. MILLER, a sole trader, doing business under the tradestyle of MIDWESTERN CONSTRUCTION & SUPPLY CO.,	)	
Defendant.	)	No. 76-C-129-C

JUDGMENT

On the 14th day of March, 1977, the above action came on for trial before the Court sitting without a jury before the Honorable H. Dale Cook, United States District Judge presiding. Plaintiff was represented by its attorneys, Ungerman, Grabel & Ungerman, by Allen Klein. Defendant announced ready and was represented by his attorneys, Blackstock Joyce Pollard Blackstock & Montgomery, by Edward F. Montgomery and William C. Kellough.

The parties agreed to a stipulation as full and final settlement of the case and such stipulation was entered into the record and approved by the Court. The stipulation entered into is as follows:

Plaintiff shall be awarded judgment rendered this date, March 14, 1977, against the defendant for the total amount of $9,000 as damages, which sum includes all costs, attorney fees, and accrued interest which were the subject of plaintiff's prayer for relief filed herein. It shall be the further judgment of the Court that no execution on said judgment shall be allowed so long as the defendant pays one-half or more of said amount on or before 45 days from the date hereof and the balance hereof on or before 90 days from the date hereof.

Defendant has dismissed both first and second counterclaims previously filed in the instant case with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that plaintiff have judgment against the defendant for the amount of $9,000 under the terms and conditions set forth herein.

JUDGE

APPROVED AS TO FORM AND CONTENT:

UNGERMAN, GRABEL & UNGERMAN

By _____
Allen Klein

Attorneys for Plaintiff

BLACKSTOCK JOYCE POLLARD
BLACKSTOCK & MONTGOMERY

By _____
Edward F. Montgomery

By _____
William C. Kellough

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

BERTHA LEE GOFF, Plaintiff, vs. DR. FRANCIS TUTTLE, Director, Oklahoma State Department of Vocational and Technical Education, Stillwater, Oklahoma; ARCH ALEXANDER and BYRLE KILLION, Assistant State Directors; R. L. BEATY, Director of Finance; LEON NASH, Director of Tulsa Skills Center, Defendants.	)	Case No. 76-C-14-C

ORDER OF DISMISSAL

Comes now the plaintiff, Bertha Lee Goff, a former employee of the Oklahoma State Department of Vocational and Technical Education in her suit against Dr. Francis Tuttle as State Director of said State agency, Arch Alexander and Byrle Killion, Assistant State Directors, R. L. Beaty, Director of Finance and Leon Nash, Director of Tulsa Skills Center for alleged discrimination in employment on the basis of race and sex, and dismisses her cause of action with prejudice against all named defendants in their individual and official capacities for reasons that an agreed settlement has been reached between said parties and approved by attorneys of record.

It is so ordered this 17th day of March, 1977.

Ow Wesselbook

United States District Judge

APPROVED:

Don Glover

Don E. Glover
Attorney for Plaintiff

David K. McCurdy

David K. McCurdy
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VERNARD W. HULSEY,)
)
Plaintiff,)
)
vs.) No. 75-C-19-C
)
INLAND STEEL COMPANY,)
)
Defendant.)

O R D E R

On January 17, 1977, a jury verdict was returned on behalf of plaintiff in the above-styled action in the amount of $300,000. Thereafter, on January 26, 1977, defendant filed a Motion for Judgment Notwithstanding Verdict and a Motion for New Trial. In said motions, the defendant asserts:

1. That the verdict is not sustained by sufficient evidence and is contrary to law.

2. That the verdict is clearly against the weight of the evidence.

3. Excessive damages appearing to have been given under the influence of passion or prejudice.

4. That the verdict is contrary to and in disregard of the Court's instructions.

5. Error of the Court in failing to sustain defendant's Motion for a Directed Verdict.

6. Error of law occurring at the trial and excepted to by the defendant.

A motion for a new trial on the ground that the verdict of the jury is against the weight of the evidence is normally one of fact and not of law and is addressed to the discretion of the trial court. Locke v. Atchison, Topeka and Santa Fe Railway Company, 309 F.2d 811 (10th Cir. 1962). In order to justify a court in setting aside the verdict of a jury, the verdict must be clearly, decidedly, or overwhelmingly against the weight of the evidence. Champion Home Builders v. Shumate,

evidence presented at trial, that the amount awarded cannot be said to be excessive. The parties were afforded every opportunity at trial to present evidence in regard to the damage issue, and defendant does not contend that the instructions given by the Court in regard thereto were erroneous. The issue was fairly presented for jury determination and the Court, having found it not to be excessive, will not set aside the verdict of the jury.

It is therefore the determination of the Court that defendant's Motion for Judgment Notwithstanding Verdict and Motion for New Trial should be and hereby are overruled.

It is so Ordered this 17th day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RONALD HADDOCK, Administrator of the estate of Delma Haddock, deceased, Plaintiff,	)	
vs.	)	No. 76-C-567-C
TOM PRICE, GLEN PARKER; and LEON CRAWFORD, OWEN WALTERS, JOE BROWN, RONNIE VANCE, and EDDIE AUSTIN, Trustees of the Town of Salina, Oklahoma; and TOWN OF SALINA, OKLAHOMA, Defendants.	)	

ORDER

This is an action in which Ronald Haddock, Administrator of the estate of Delma Haddock, deceased, sues defendants Tom Price, Glen Parker and Leon Crawford, Owen Walters, Joe Brown, Ronnie Vance, and Eddie Austin, Trustees of the Town of Salina, Oklahoma and the Town of Salina, Oklahoma. Plaintiff alleges that the deceased was arrested for alleged violations of the ordinances of the town of Salina for "public drunk" and "open container" in the Town of Salina on or about January 31, 1976, by defendant Glen Parker who was an officer of the defendant town. Plaintiff also alleges that the defendants conspired with Officer Parker "to provide a place of incarceration without adequate supervision for inmates to protect and safeguard their safekeeping and general welfare."

Plaintiff asserts jurisdiction is pursuant to Title 28 U.S.C. § 1331 and is authorized by virtue of 42 U.S.C. §§ 1983 and 1985(2) and (3).

Each of the defendants, except Glen Parker, have filed a Motion to Dismiss pursuant to Rule 12(b)(6) F.R.Civ.P. on the grounds that the Complaint fails to state a claim upon which relief can be granted.

The defendant Town of Salina, Oklahoma, claims it is not a "person" and therefore no cause of action pursuant to Title 42 U.S.C. 1983 and 1985 can be maintained against it. The defendant Town correctly cites Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, (1961), and, among other cases, Dewell v. Lawson, 489 F.2d 877 (C.A. 10th Cir. 1974), which cases hold that a municipality is not a person within the meaning and requirement of Title 42 U.S.C. 1983 and 1985.

The Motion to Dismiss of the defendant Town as to any action predicated upon Title 42 U.S.C. 1983 and 1985 is therefore sustained.

The defendant Tom Price, former Chief of Police of the Town of Salina, Oklahoma, has filed his separate Motion to Dismiss for failure to state a cause of action and argues he is not "generally speaking or individually in his official capacity" a person against whom relief can be granted. The Motion is also urged on grounds that the defendant "believes" the plaintiff predicates his action on the principle of "respondeat superior."

The cases are too numerous to need citation holding that an action can be maintained against an individual who is alleged to have committed deprivations in the exercise of official capacity. The very purpose for which Congress enacted Section 1983 was to provide a remedy for the deprivations of constitutional rights, privileges and immunities by official abuse of position. Monroe v. Pape, supra; Williams v. United States, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951). The Motion of defendant Price on this ground is therefore denied.

Defendant Price also contends that he "believes" the plaintiff predicates his action on the doctrine of "respondeat superior." In Jennings v. Davis, 476 F.2d 1271 (C.A. 8th Cir. 1973), that Court held such a doctrine was not applicable. It is axiomatic that a defendant must be present or have the opportunity or ability

to intervene and prevent constitutional deprivation before he can be held responsible under the statutes relied upon by plaintiff. However, a "belief" that such doctrine is relied upon by the plaintiff is not sufficient to sustain a motion to dismiss where a fair reading of the complaint otherwise supports an action against the defendant. Attorneys often fail to recognize that under Rule 12(b) F.R.Civ.P., in considering a motion to dismiss, the the trial court must exclude all matters outside the pleadings unless such motion is treated as one for summary judgment and the parties are given an opportunity to present material pertinent to such a motion under Rule 56. The Court cannot speculate that plaintiff predicates his action on "respondeat superior" and the pleadings do not so state in considering the Motion to Dismiss. Torres v. First State Bank of Sierra County, 10th Cir., ___ F.2d ___, No. 76-1188, opinion filed March 3, 1977. It is only when, as a mtter of law, the complaint without considering other matters, is insufficient that a motion to dismiss can properly be sustained. See Utah State University v. Bear Stearns Co., 10th Cir. ___ F.2d ___, No. 75-1854, opinion filed January 24, 1977.

Reasonably construed, the Complaint alleges the deceased was arrested without probable cause, was placed in the city jail although she was in need of immediate medication and medical assistance which was refused, thereby jeopardizing her life, which conditions caused her death. It is also alleged that all the individual defendants had notice of these actions and therefore contributed to the demise of the deceased. Such a statement of facts, if true, are sufficient to constitute a cause of action; and therefore, the Motion to Dismiss must be overruled.

For the reasons heretofore given, which equally apply to all individual defendants who filed their Motions to Dismiss, said Motions are accordingly hereby overruled. As previously stated, the Motion to Dismiss filed by the Town of Salina, Oklahoma, is sustained.

It is so Ordered this 17th day of March, 1977

H. Dale Cook

H. DALE COOK
United States District Judge

INTHE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PACIFIC CASCADE CORPORATION, a corporation, Plaintiff,	)	
vs.	)	No. 76-C-491-C
INTERWEST CORPORATION, a corporation, Defendant.	)	

FILED

MAR 15 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for hearing upon the joint application of the plaintiff and the defendant for an order dismissing the above entitled cause in consideration of a Settlement Agreement between the parties;

IT IS ORDERED THAT the above entitled cause of action including the complaint of the plaintiff and the counterclaim of the defendant be and are hereby dismissed with prejudice to refiling the same.

DATED this 15th day of March, 1977.

H. Dale Cook
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GRENADA ANN LEAKEY, Administratrix
With Will Annexed for the Estate of
Charles L. Perkins, Jr., and for the
Estate of Betty D. Perkins,

Plaintiff,

vs.

COAST TO COAST STORES (CENTRAL
ORGANIZATION) INCORPORATED, and
CHARLES R. FARRELL,

Defendants.

No. 76-C-208-C

J U D G M E N T

This matter came on for hearing at the previously scheduled pre-trial conference on the 11th day of March, 1977. The plaintiff appeared through her counsel, John Imel and Russell Cobb III and the defendants appeared through their counsel, Thomas R. Brett. Also appearing in person on behalf of the plaintiff was Stephen Leakey, the husband of Grenada Ann Leakey, who is the testamentary guardian of the minor children herein, a trustee of the minor children's trusts and presently in actual care and custody of said minor children.

The parties through their counsel of record announced to the Court a settlement of the three causes of action in the total sum of $200,000.00 had been reached and the Court was requested by the parties to hear testimony concerning said settlement and enter a judgment for the plaintiff.

The Court after hearing explanation of counsel and considering the sworn testimony of Stephen Leakey and the interrogatory testimony of Grenada Ann Leakey filed herein, hereby approves the settlement entered into by the parties and directs a judgment be entered on the three causes of action as follows:

First Cause of Action in the amount of $110,000.00, to be divided equally ($55,000.00)each) for the use and benefit of Carey Beth Perkins, a minor, and Drew Charles Perkins, a minor, the sole and only surviving children and heirs at law of the deceased parent ;

Second Cause of Action in the amount of $82,000.00, to be divided equally ($41,000.00 each) for the use and benefit of Carey Beth Perkins, a minor, and Drew Charles Perkins, a minor, the sole and only surviving children and heirs at law of the deceased parent ;

Third Cause of Action in the amount of $8,000.00, for the funeral expenses of Charles L. Perkins, Jr., and Betty D. Perkins, and the automobile property damage.

The Court further determines that said settlement and judgment herein entered is fair, just and reasonable and in the best interests of the sole surviving minor children of the deceased parents, Charles L. Perkins, Jr., and Betty D.Perkins.

IT IS THEREFORE ORDERED judgment is entered herein for the plaintiff in the total sum of Two Hundred Thousand Dollars ($200,000.00), to be allocated to the three causes of action as set out herein, for all of which let execution issue this 15th day of March, 1977.

Judge Dale Cook

United States District Judge

APPROVED AS TO FORM:

Attorney for Plaintiff

Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

-v-

DONAL JOE BRESHEARS, ET AL.,

Defendants.

Civil Action No. 76-C-493 B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 15th day of March, 1977, the plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the defendant Oklahoma Tire & Supply Company, a corporation, appearing by its attorney, Jerry L. Goodman; and the defendants Donal Joe Breshears and Mary K. Breshears appearing not.

The Court, being fully advised and having examined the file herein, finds that Donal Joe Breshears and Mary K. Breshears were served with Summons and Complaint on December 8, 1976, and with Summons and Amendment to Complaint also on December 8, 1976; and that Oklahoma Tire & Supply Company, a corporation, was served with Summons, Complaint, and Amendment to Complaint on November 8, 1976.

It appears that Oklahoma Tire & Supply Company, a corporation, has duly filed its Disclaimer on November 18, 1976; and that Donal Joe Breshears and Mary K. Breshears have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note, covering the following-described real property located in Nowata County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot 4 and the North Half of Lot 5, in Block 4, Barbre Addition to the Town of Delaware, Nowata County, Oklahoma.

THAT the defendants Donal Joe Breshears and Mary K. Breshears did, on the 12th day of March, 1973, execute and deliver to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the amount of $15,580.00, with 7-1/4 percent interest per annum, and further providing for the payment of annual installments of principal and interest.

The Court further finds that the defendants Donal Joe Breshears and Mary K. Breshears made default under the terms of the aforesaid mortgage note by reason of their failure to make annual installments due thereon, which default has continued, and that by reason thereof, the above-named defendants are now indebted to the plaintiff in the amount of $18,526.93 as of November 15, 1976, plus interest from and after said date at the rate of 7-1/4 percent per annum, until paid, plus the cost of this action, accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover judgment against defendants Donal Joe Breshears and Mary K. Breshears, in personam, for the sum of $18,526.93, with interest thereon at the rate of 7-1/4 percent per annum from November 15, 1976, plus the cost of this action, accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said defendants to satisfy plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding

him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the defendants, and each of them, and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

Allen E. Barrow
Chief Judge, United States District Court, Northern District of Oklahoma

APPROVED:

ROBERT P. SANTEE
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOSEPH J. MILLER, LUCILLE B. MILLER, RUTH SATTERLEE, formerly ROWLAND and DAL SATTERLEE, Plaintiffs,	)	
vs.	)	Case No. 69-C-71
JIMMIE J. RYAN, Defendant,	)	
MARIAM RYAN, Intervenor.	)	

JUDGMENT

This matter came on for hearing this 14th day of March, 1977, the plaintiffs appearing by and through their attorneys, David H. Sanders and Tom Mason, the defendant appearing not, and the intervenor appearing by and through her attorney, Robert L. Shepherd, and after being fully advised in the premises, the Court finds:

I

That the state court has found that the Divorce Decree between JIMMIE J. RYAN and MARIAM LEE RYAN was entered on September 30, 1969, and that the title to the property described herewith as:

> The West 495 feet of the East half of the Southwest quarter (E/2 SW/4) of Section 16, Township 18 North, Range 14 East, Tulsa County, Oklahoma, containing thirty acres, more or less

passed to MARIAM LEE RYAN, intervenor, on this 30th day of September, 1969.

II

That the Judgment relied upon herein by the plaintiffs against JIMMIE J. RYAN was entered on the 7th day of October, 1969.

III

The Judgment herein obtained by the plaintiffs was

subsequent to the property being awarded to the intervenor.

IV

That the plaintiffs herein have no right, title, nor interest in said property.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiffs, JOSEPH J. MILLER, LUCILLE B. MILLER, RUTH SATTERLEE, formerly ROWLAND and DAL SATTERLEE, have no right, title, nor interest in the property of MARIAM LEE RYAN, described as follows:

> The West 495 feet of the East half of the Southwest quarter (E/2 SW/4) of Section 16, Township 18 North, Range 14 East, Tulsa County, Oklahoma, containing thirty acres, more or less

and that the plaintiffs herein are permanently enjoined from interfering in the ownership and title to said property in MARIAM LEE RYAN by reason of the Judgment referred to herein.

/s/ H. Dale Cook
Judge

APPROVED:

SANDERS, McELROY & CARPENTER

By: _____
Attorney for Plaintiffs

ROBERT L. SHEPHERD

By: _____
Attorney for Intervenor

FILED

MAR 11 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

SECURITY BANK AND TRUST COMPANY, Plaintiff, vs. UNITED STATES FIDELITY AND GUARANTY COMPANY, Defendant.	)	NO. CIV-76-C-176

ORDER OF DISMISSAL

Now on this 11th day of March, 1977, the above entitled cause comes on upon the application of plaintiff for an order dismissing the above entitled action upon the merits and with prejudice to a future action as to defendant, United States Fidelity and Guaranty Company; and the Court being well advised in the premises is of the opinion that the said motion should be sustained.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above entitled cause of action and complaint be and the same ~~is~~ are hereby dismissed upon the merits and with prejudice to a future action as to defendant, United States Fidelity and Guaranty Company.

Allen E. Barrow

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

John R. Stallcup

Attorney for Plaintiff

FENTON, FENTON, SMITH, RENEAU & MOON

BY: Robert J. Petrick

ROBERT J. PETRICK

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WADRESS H. METOYER, JR., Petitioner,	)	
vs.	)	No. 76-C-434-C
STATE OF OKLAHOMA, Respondent.	)	

ORDER DISMISSING PETITION
FOR WRIT OF HABEAS CORPUS

The Court has before it for consideration the Petition of Wadress H. Metoyer for a Writ of Habeas Corpus, filed pro se pursuant to Title 28 U.S.C. § 2254. Petitioner has responded to an order of the Court directing him to more specifically state his grounds for relief. Respondent has filed a response, pursuant to an order of the Court directing it to show cause why the writ of habeas corpus should not be granted.

Petitioner was convicted in the District Court, Tulsa County, of the offense of Robbery with Firearms, and sentenced to a term of two hundred (200) years' imprisonment. The Oklahoma Court of Criminal Appeals modified the sentence to fifty (50) years, but otherwise affirmed the judgment of the District Court. Metoyer v. State, 538 P.2d 1066 (Okl.Cr. 1975). A Petition for Writ of Certiorari was denied by the United States Supreme Court on November 3, 1975. Petitioner demands his release from custody and as grounds therefore claims that he is being deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. In particular, petitioner claims:

1. That the closing arguments of the prosecutor were highly improper and prejudicial;

2. That certain remarks made by the prosecutor during voir dire were prejudicial;

3. That the lineup was overly suggestive and prejudicial, and that an in-court identification was tainted thereby;

4. That the conviction was devoid of evidentiary support;

5. That the admission into evidence of certain evidence, statements of petitioner and the lineup identification were improper in that they were fruits of petitioner's unlawful arrest, made without a warrant or probable cause.

These same arguments were raised in the Tulsa County District Court in petitioner's Application for Post-Conviction Relief filed pursuant to Title 22 O.S. § 1080 et seq. Denial of this Application was affirmed by the Oklahoma Court of Criminal Appeals. Petitioner has exhausted available state remedies.

In determining whether an evidentiary hearing is necessary prior to ruling upon the validity of petitioner's allegations, this Court must look to the requirements established by the United States Supreme Court in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

> "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding." 372 U.S. at 312.

In the instant case, the material facts do not appear to be in dispute. Rather, petitioner seems to argue that it is the legal conclusions drawn by the state courts from these facts which are incorrect. There is no indication that the underlying facts themselves were not adequately developed during the trial process. For these reasons, this Court deems it unnecessary to conduct an evidentiary hearing.

Petitioner's first allegation relates to comments made by the prosecuting attorney during his closing arguments to the jury. The standard to be applied in determining whether there has been a denial of a fair and impartial trial is whether the proceedings were ". . . conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the

very concept of justice,' and in a way that 'necessarily prevent[s] a fair trial.'" Redford v. Smith, 543 F.2d 726, 731 (10th Cir. 1976), citing Lyons v. Oklahoma, 322 U.S. 596, 605, 64 S.Ct. 1208, 1213, 88 L.Ed. 1481 (1944). The burden of showing this essential unfairness is upon ". . . him who claims such injustice and seeks to have the result set aside, and . . . it must be sustained not as a matter of speculation but as a demonstrable reality." Adams v. United States ex rel. McCann, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942). A portion of the allegedly improper argument dealt with the prosecutor's characterization of the demeanor of petitioner and a defense witness on the witness stand. (Tr. 402-413; 424-428). The prosecuting attorney must be allowed ". . . [a] reasonable range of latitude . . . in drawing inferences and deductions from the facts and circumstances shown in the trial and in commenting thereon." Sanders v. United States, 238 F.2d 145, 148 (10th Cir. 1956), and comments similar to those in the instant case have been held to fall short of a denial of due process. Sanders v. United States, supra, (characterization of defendants as thugs and statement that they were well educated and did a cleverly planned job in breaking into a safe); Kelley v. Rose, 346 F.Supp. 83 (E.D. Tenn. 1972) (characterization of defendants in a rape trial as "things", "animals" and "beasts"). This Court therefore finds that these statements did not deprive petitioner of a fair and impartial trial.

Petitioner also complains of statements by the prosecuting attorney to the effect that petitioner and his witness lied on the witness stand. There are two categories of such comments which have been recognized and should be distinguished. One category contains statements of belief based upon the evidence adduced at trial, and the other includes "statements of belief that the jury was expected to understand came from the prosecutor's personal knowledge of, and from the prosecutor's prior experience with, other defendants." United States ex rel. Haynes v. McKendrick,

350 F.Supp. 990 (S.D.N.Y. 1972). The former are not wholly improper in the absence of any intimation that they were founded on personal knowledge or matters not in evidence, Id.; Williams v. United States, 265 F.2d 214 (9th Cir. 1959), while the latter are clearly improper. United States ex rel. Haynes v. McKendrick, supra; Stewart v. United States, 247 F.2d 42 (D.C. Cir. 1957). The prosecutor in the instant case prefaced his comments with the words "by the evidence presented." (Tr. 428). His comments therefore were based upon the evidence presented at trial and not upon his personal knowledge.

In reviewing the entire record of this case as it may have been affected by the prosecutor's comments during closing argument, this Court concludes, as did the United States District Court for the Southern District of New York, that it

> ". . . cannot say that the remarks, despite their impropriety, violated petitioner's Fourteenth Amendment rights. Viewing the trial record as a whole, the prejudicial non-racial comments did not create, as a demonstrable reality, such essential unfairness at petitioner's trial that his conviction must be reversed on federal constitutional grounds." United States ex rel. Haynes v. McKendrick, supra at 997.

Petitioner's second contention concerns a statement made by the prosecuting attorney during jury voir dire. During that examination, the prosecutor made the statement, "You understand that neither the information nor his plea of guilty is evidence in this case?" (Tr. 125). In fact, petitioner's plea was "not guilty". Standing alone, this comment does appear to be prejudicial. However, viewing the entire record, it is apparent that this misstatement was unintentional and that any prejudicial effect was mitigated by later statements. The trial judge correctly stated petitioner's plea in his statement of the case to the jury (p.2), as did the prosecuting attorney in his opening statement (Tr. 133). Petitioner alleges that this statement had the effect of shifting the burden of proof to himself and of requiring him to prove his innocence. This contention is

without merit, as the trial judge correctly instructed the jury as to the burden of proof (instructions 1 & 2). Viewing the record as a whole, this Court cannot say that this statement constituted a denial of "that fundamental fairness essential to the very concept of justice." Redford v. Smith, supra.

Petitioner's third allegation is that a lineup in which he was identified by a prosecution witness was overly suggestive and prejudicial. A lineup procedure is in violation of the Constitution if ". . . the confrontation . . . [is] so unnecessarily suggestive and conducive to irreparable misidentification that [petitioner is] denied due process of law." Stovall v. Denno, 388 U.S. 293, 301-302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The existence of such a violation depends upon the totality of circumstances surrounding the confrontation. 388 U.S. at 302. In this case, the trial judge conducted an evidentiary hearing which adequately developed the facts surrounding the lineup. (Tr. 162-171; 338-348). The procedures employed in petitioner's lineup can best be analyzed by comparison with a case cited by petitioner in support of his contention that his lineup was prejudicial. In Foster v. California, 394 U.S. 440 (1969), the initial lineup contained three men. Foster was six feet tall, the others five feet, five or six inches tall. Foster wore a leather jacket (presumably given to him by the police) similar to one the witness had seen on the robber. Following this lineup, the witness could not positively identify Foster, so the witness was permitted to confront Foster individually. Positive identification was still not made at that time. Some seven to ten days later, a second lineup was conducted. Foster was the only man in the second lineup who had also been in the first. At this time, the witness was "convinced" that Foster was the one who had committed the robbery. In condemning the actions of the police in this case, the Supreme Court said,

> "[t]he suggestive elements in this identification procedure made it all but inevitable

> that [the witness] would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.'" 394 U.S. at 443.

The procedures utilized in the instant case are markedly different than those condemned in Foster. This lineup was composed of five men, all of the same race and of several different heights. All of the men wore street clothing, and none was asked to change his clothes for purposes of the lineup. (Tr. 167). The police made an effort to make all the men appear to be the same height by asking some of them to remove their shoes. (Tr. 168). While two of the men, including petitioner, wore brighter clothes than the others, the witness was able to select only the petitioner as one of the men she saw near the scene of the robbery. (Tr. 186-187). Unlike the multiple confrontations present in Foster, the witness in this case viewed the lineup only once, and only for five minutes before identifying the petitioner. (Prelim. hearing tr. 25). The procedures utilized in this case in no way made it "all but inevitable" that petitioner would be selected by the witness. After studying the photograph taken at the time of the lineup, and considering all of the surrounding circumstances and the record as a whole, this Court does not find that the lineup ". . . was so unnecessarily suggestive and conducive to irreparable misidentification that [petitioner] was denied due process of law." Stovall v. Denno, supra.

Petitioner's fourth claim is that the conviction was devoid of evidentiary support. This claim is without merit, for "[s]ufficiency of evidence to support a State conviction raises no Federal constitutional question, and cannot be considered in Federal habeas proceedings by State prisoners." Sinclair v. Turner, 447 F.2d 1158, 1161 (10th Cir. 1971).

Petitioner's final ground for relief is that certain evidence should have been excluded from his trial because it was the product of his arrest without probable cause. The issue of probable cause

was investigated fully at petitioner's preliminary hearing, at which time petitioner's motion to suppress evidence obtained in a search incident to his arrest was overruled. (Prelim. Hearing tr. 44). Because the issue of probable cause was litigated in the state courts, this Court is precluded, by the decision in Stone v. Powell, 44 L.W. 5313 (July 6, 1976), from considering petitioner's claim as it relates to the exclusion of evidence allegedly obtained in violation of the Fourth Amendment. However, if this Court were permitted to review the issue of probable cause, it would find that probable cause for arrest was present in this case.

The standard to be applied in determining the existence of probable cause for arrest was enunciated by the United States Supreme Court in Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

> "Whether [the] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." 379 U.S. at 91.

The facts relating to probable cause in the instant case are as follows: The robbery took place in the office of the Manor Motel in Tulsa. It was discovered at about 8:10 A.M. by an employee of the motel. This employee notified the police and gave them a description of two men she had seen walking from the office just before she entered it and a description of an automobile which she had seen parked in the motel parking lot and which she believed was being used by the two men. The description received by the arresting officer over his radio was of a half-gold vinyl over gold late model two-door car, occupied by two Negro males. Shortly before 8:45 A.M., at a distance of about ten miles from the motel, the officer observed a vehicle fitting

the description, occupied by two Negro males, traveling on the same street in the opposite direction. The officer turned around and began following the vehicle, which did not stop, but instead accelerated to forty-five to fifty miles per hour. Following a chase of one to two minutes through a residential area, the vehicle became stuck when the driver attempted to drive it across a lawn. At that point, the passenger jumped out of the car and ran, ignoring shots fired in his direction by the officer. Petitioner, the driver of the car, was then placed under arrest.

Petitioner's arguments as to the sufficiency of the description of the car and its occupants, as a basis for probable cause, are directed to the point in time at which the officer turned around and began following him. However, the arrest was not made at that time. The arrest was made following a high-speed chase through a residential neighborhood, at the conclusion of which one of the occupants fled from the officer on foot after the car became stuck in the front lawn of one of the residences. The inescapable conclusion to be drawn from these facts, all within the knowledge of the arresting officer, is that, at the moment the arrest was made, a prudent man would have been warranted in believing that the petitioner had committed or was committing an offense. Beck v. Ohio, supra. Based upon these facts and the standard imposed by the United States Supreme Court, the arresting officer in the instant case had probable cause to arrest the petitioner.

Therefore, based upon an examination of the entire record in this case, the Court finds that petitioner is not in custody in violation of the Constitution of the United States. The Petition for Writ of Habeas Corpus should be and is hereby dismissed.

It is so Ordered this 11th day of March, 1977.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARL CHEATHAM, Plaintiff,	)	
-vs-	)	No. 76-C-534-C
CENTURY GEOPHYSICAL CORPORATION, Defendant.	)	

FILED
MAR 11 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF REMAND

The motion of the plaintiff to remand in the above-entitled action to the District Court of Creek County, ~~Bristow~~ SAPULPA Division, State of Oklahoma, in which it was originally brought, having regularly come on to be heard on the 2nd day of March, 1977, and the Court having considered the motion and the Affidavits of the various parties filed herein, and all of the proceedings heretofore had, and having heard the arguments of counsel, and it appearing to the Court that the above-entitled action was removed to the United States District Court for the Northern District of Oklahoma improvidently and without jurisdiction, for the reason that the defendant, Century Geophysical Corporation, was a resident of the State of Oklahoma, having its principal place of business in Tulsa, Tulsa County, State of Oklahoma, at the time that the plaintiff's cause of action arose;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above-entitled action be, and it is hereby remanded to the District Court of Creek County, ~~Bristow~~ SAPULPA Division, State of Oklahoma.

DATED this 11th day of March, 1977.

H. Dale Cook
H. DALE COOK, District Judge of
the Northern District of Oklahoma

APPROVED AS TO FORM:

R Dow Bonnell
Attorney for Plaintiff

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 11 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

RICKY F. McELROY,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 76-C-273
	)	
THE M.K.& T. RAILWAY COMPANY, a corporation,	)	

DISMISSAL WITH PREJUDICE

Comes now the plaintiff, Rickey F. McElroy, and hereby dismisses the above entitled cause of action and complaint with prejudice to the filing of a future action at the cost of defendant.

Dated this 4th day of March, 1977.

RICKY F. McELROY, PLAINTIFF

Ricky F McElroy

ORDER

IT IS ORDERED that the cause of action and complaint are dismissed with prejudice at the cost of the defendant.

ENTERED this 14th day of March, 1977.

Allen E. Barrow
CHIEF UNITED STATES DISTRICT JUDGE

FILED

MAR 14 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

BONDS, MATTHEWS
& BONDS
ATTORNEYS AND
COUNSELLORS AT LAW
444 COURT STREET
P. O. BOX 1906
MUSKOGEE, OKLA. 74401

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JOYCE MARIE ENGLISH,

Plaintiff,

vs.

VERA KUYKENDALL, LOUIS FENSTER, STANLEY THOMEYER, and TOV CORPORATION, a Corporation,

Defendants.

75-C-322-B

FILED

MAR 10 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

MEMORANDUM AND ORDER

The Court has for consideration the Motion for Summary Judgment filed by Vera Kuykendall, Louis Fenster, Stanley Thomeyer and TOV Corporation, the briefs in support and opposition thereto, and, having carefully persued the entire file, including the deposition of plaintiff, Joyce Marie English, and Answer to Interrogatories, and, being fully advised in the premises, finds:

Plaintiff instituted the present litigation in this Court on July 21, 1975, claiming racial discrimination in rental of property in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601 et seq. and Title 42 U.S.C. §§1981 and 1983, and seeks monetary and injunctive relief.

The alleged discrimination occurred on May 29, 1974. Under the provisions of 42 U.S.C. §3612(a) the rights granted by Sections 3603, 3604 and 3606 of Title 42 U.S.C. may be enforced by civil actions in appropriate United States District Courts. Section 3612(a) specifically provides that any civil action brought

pursuant to these sections must be commenced within 180 days after the alleged discriminatory practice occurred. Plaintiff's action under 42 U.S.C. §3601 et seq. is not timely filed, and the Motion for Summary Judgment as to the action under said sections should be sustained.

As to the balance of the Motion for Summary Judgment, the Court finds that there are questions of fact remaining to be disposed of and the case, at this juncture, with all the evidentiary matters submitted by the parties having been examined, should be overruled.

IT IS, THEREFORE, ORDERED that the Motion for Summary Judgment as to the cause of action relating to 42 U.S.C. §3601 et seq. be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion for Summary Judgment as to the balance of the claim asserted by the plaintiff be and the same is hereby overruled.

IT IS FURTHER ORDERED that plaintiff's objections to findings and recommendations of the Magistrate as to the claims asserted under 42 U.S.C. §§1981 and 1982 are sustained.

ENTERED this 10th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. An article of food consisting of 17 cases, more or less, each containing 12 bottles, and 12 bottles, more or less, labeled in part: (case and bottle) "Vita Life Calcium gluconate and dimethyl glycine * (a metabolite of the amino acide, (sic) glycine). A formula for Calcium Pangamate, * a salt of Pangamic Acid, * Vitamin B 15 * Each tablet, 50 mg. *** 200 (or 100) TABLETS BELVEDERE LABORATORIES *** Hayward, CA. ***" and undetermined quantities of the aforesaid article, labeled and packaged as aforesaid, Defendant.	)	CIVIL ACTION NO. 76-C-613-C

FILED
MAR 10 19
Jack C. Silver, Clerk
U. S. DISTRICT COURT

DEFAULT DECREE OF CONDEMNATION

On December 8, 1976, a Complaint for Forfeiture against the above-described article was filed on behalf of the United States of America. The Complaint alleges that the article proceeded against is a food which was introduced into interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 342(a)(2)(C) in that it bears and contains food additives, namely calcium pangamate and dimethyl glycine, which are unsafe within the meaning of 21 U.S.C. 348(a) since their use and intended use are not in conformity with a regulation or exemption in effect pursuant to 21 U.S.C. 348, and since, with specific reference to the food additive, dimethyl glycine, the article fails to comply with the requirements of the food

additive regulation, 21 CFR 121.1002.

That the aforesaid article was misbranded when introduced into and while in interstate commerce within the meaning of 21 U.S.C. as follows:

343(a) in that the the statements "A formula for Calcium Pangamate, * a salt of Pangamic Acid. *", "Vitamin B 15", "Each table, 50 mg.", "Suggested use: as a dietary supplement, 2 tablets daily.", "No need in human nutrition has been established", and "Vita-Life is not intended for use in the diagnosis, cure, treatment or prevention of disease", which appear on the labels of the article are false and misleading since calcium pangamate is not an identifiable substance and is not a vitamin or pro-vitamin, since there is no accepted scientific evidence which establishes any nutritional properties of the substance, since there is no accepted scientific evidence to identify a deficiency of calcium pangamate in man or other animals, since the safety of calcium pangamate has not been demonstrated, and since no medical, nutritional, or other usefulness for calcium pangamate has been established; and

343(i)(2) in that the article is fabricated from two or more ingredients and its label fails to declare the common or usual name of each ingredient.

Pursuant to monition issued by this Court, the United States Marshal for this District seized said article on December 15, 1976.

It appearing that process was duly issued herein and returned according to law; that notice of the seizure of the above-described article was given according to law; and that no persons have appeared or interposed a claim before the return day named in said process;

Now, therefore, on motion of Nathan G. Graham, United States Attorney for the Northern District of Oklahoma, by Robert P. Santee, Assistant United States Attorney, for a Default Decree

of Condemnation and Destruction, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the default of all persons be and the same are entered herein; and it is further

ORDERED, ADJUDGED AND DECREED that the article so seized is adulterated within the meaning of 21 U.S.C. 342(a)(2)(C) in that it bears and contains food additives, namely calcium pangamate and dimethyl glycine, which are unsafe within the meaning of 21 U.S.C. 348(a) since their use and intended use are not in conformity with a regulation or exemption in effect pursuant to 21 U.S.C. 348, and since, with specific reference to the food additive, dimethyl glycine, the article fails to comply with the requirements of the food additive regulation, 21 CFR 121.1002; the article was misbranded when introduced into and while in interstate commerce within the meaning of 21 U.S.C. as follows:

343(a) in that the the statements "A formula for Calcium Pangamate, * a salt of Pangamic Acid. *", "Vitamin B 15", "Each table, 50 mg.", "Suggested use: as a dietary supplement, 2 tablets daily.", "No need in human nutrition has been established", and "Vita-Life is not intended for use in the diagnosis, cure, treatment or prevention of disease", which appear on the labels of the article are false and misleading since calcium pangamate is not an identifiable substance and is not a vitamin or pro-vitamin, since there is no accepted scientific evidence which establishes any nutritional properties of the substance, since there is no accepted scientific evidence to identify a deficiency of calcium pangamate in man or other animals, since the safety of calcium pangamate has not been demonstrated, and since no medical, nutritional, or other usefulness for calcium pangamate has been established; and

343(i)(2) in that the article is fabricated from two or more ingredients and its label fails to declare the common or usual name of each ingredient;

ORDERED, ADJUDGED AND DECREED that the article is condemned and forfeited to the United States pursuant to 21 U.S.C. 334(a); and it is further

ORDERED, ADJUDGED AND DECREED that the United States Marshal in and for the Northern District of Oklahoma shall forthwith destroy the seized article and make return due to this Court.

Dated this 10th day of March, 1977.

UNITED STATES DISTRICT JUDGE

bcs

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CARRIE LEE MASON,

Plaintiff,

vs.

THE NATIONAL FLOOD INSURERS ASSOCIATION, REPUBLIC VANGUARD INSURANCE GROUP, MID-AMERICA SAVINGS AND LOAN ASSOCIATION, DANNY SMITH, JOHN DOE AND MARY ROE,

Defendants.

77-C-23-B

ORDER

The Court has for consideration the Motion to Remand filed by the plaintiff, the briefs in support and opposition thereto, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

This action was originally commenced by plaintiff against the defendant in the District Court of Tulsa County, Oklahoma, on December 23, 1976.

A petition for removal was filed by the defendants, National Flood Insurers Association and Republic Van Guard, on January 17, 1977.

The jurisdictional allegation in the Removal Petition is as follows:

> "That this is a civil action of which the District Court of the United States has original jurisdiction, being founded on a claim arising under the laws of the United States, Title 28 U.S.C., §1441 (b) and (c) and without regard to the amount in controversy, Title 42 U.S.C. §4053. That the plaintiff bases her claim for relief against the defendants upon, by virtue of and under the federal statutes and Acts of Congress."

The removing defendant contends that by virtue of Title 42 U.S.C. §4053 the Federal Court has exclusive jurisdiction in the instant litigation. That section provides, in pertinent part:

> "*** and, upon disallowance by any such company or other insurer of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance of the claim, may institute an action on such claim against such company or other insurer in the United Stated district court for the district in which the insured property or the major part thereof shall have been situated, and jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy." (Emphasis supplied)

Removing defendants further rely on 24 CFR §1912.22, which provides:

> "Upon the disallowance of the Association or its agents of any claim on grounds other than failure to file a proof of loss, or upon the refusal of the claimant to accept the amount allowed upon any such claim, after appraisal pursuant to the policy provisions, the claimant within one year after the date of mailing of the notice of disallowance or partial disallowance of the claim may, pursuant to 42 U.S.C. 4053, institute an action on such claims against the Association, only in the U.S. District Court for the district in which the insured property or the major portion thereof shall have been situated without regard to the amount in controversy." (Emphasis supplied)

It should be noted in the regulation promulgated in CFR the word "only" has been inserted, while not appearing in the statute as enacted by the Congress.

The legislative history concerning §4053 is found in U.S. Code Cong. & Adm. News, 1968, Volume 2, page 3022, Section 1113, which states:

> "This section authorizes private insurers participating in the pool to adjust the pay claims for losses and permits any claimant, upon disallowance or partial disallowance of a claim, to institute an action, within 1 year after notice of the disallowance was mailed in the U.S. district court for the district in which the insured property or the major portion of it was situated. Jurisdiction would be conferred on the district court without regard to the amount in controversy. (Claimants could, of course, also avail themselves of legal remedies in State courts.)" (Emphasis supplied)

This Court finds nothing in the language of §4053 that infers exclusive jurisdiction in the federal court, and, in fact, the legislative history hereinabobe delineated expressly states that claimants are not precluded from availing themselves of legal remedies in State Courts.

This Court will not discuss the myraid number of cases in detail found in Volume 46, Statutes, keynote 227, Modern Federal Practice Digest, discussing the semantic connotation placed on the use of the words "shall" and "may", other than to state that the word "shall" is generally construed as being mandatory or directive and the word "may" as permissive or discretionary.

Additionally, the Court finds that there is no allegation or contention in the complaint filed by the plaintiff that presents an issue or controversy in respect to the validity, construction or effect of the Act raised by the moving defendants.

It appears to the Court that the provision cited in CFR extends jurisdiction in excess of that delineated in the statute, and in fact oversteps the boundaries of interpretation of the statute, especially in view of the legislative history. It is fundamental that a rule or regulation may only implement the law, be in furtherance of the intention of the legislature as evidenced by the acts of the legislative body. By the insertion of the word "only", the effect is to confer exclusive jurisdiction on the federal Court and this Court does not so read the statute or the legislative history.

See Burrell v. Turner Corporation of Oklahoma, Inc., et al, No. 76-C-568-B, United States District Court for the Northern District of Oklahoma, decided January 26, 1977.

The Court having made the findings above, there is no need to discuss the contentions raised as to separate and independent cause of action.

IT IS, THEREFORE, ORDERED that plaintiff's Motion to Remand be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the District Court of Tulsa County, Oklahoma.

ENTERED this 18th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BUCKY WILLIS,)
)
Plaintiff,)
)
-vs-) No. 75-C-540-C
)
JACK E. ARRINGTON,)
)
Defendant.)

JUDGMENT

This matter coming on before me the undersigned Judge this 8th day of ~~February~~ March, 1977, the jury impanelled in the above styled and numbered cause having heretofore on the 15th day of February, 1977 returned a verdict on plaintiff's First Cause of Action in the amount of $1,500.00 and a verdict on the plaintiff's Second Cause of Action in the amount of $1,150.00, and the Court having received said verdicts and having determined that the plaintiff is entitled to judgment only on the greater of said verdicts and therefore entitled to judgment in the amount of $1,500.00 for the defendant's statutory (15 U.S.C.A. 1989) cause of action for a violation of 15 U.S.C.A. 1981 et.seq. with intent to defraud.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the plaintiff have and he hereby has judgment against the defendant in the amount of $1,500.00, for a reasonable attorneys' fee in the amount of $2,500.00, and for his costs herein expended.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

HORTENSE KROW HAMILTON SMITH, Plaintiff,

vs.

ROSE COLOMBE and ROBERT COLOMBE, and MCDOWELL OIL PROPERTIES, Defendants.) No. 75-C-500 B

ORDER

The notice for dismissal filed by the plaintiff herein, came on before this Court, and the Court being fully advised in the premises does hereby ORDER the plaintiff's cause of action and Complaint dismissed, with prejudice.

DONE THIS 8th day of March, 1977.

Allen E. Barrow

ALLEN E. BARROW, CHIEF JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LILLIAN PEARL LAY,)
)
Plaintiff,)
)
vs.) No. 76-C-382-C
)
J. OWEN BRADSHAW,)
)
Defendant.)

FILED
MAR 7 1977 9:40
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now the plaintiff, through her attorney, Jefferson G. Greer, and the defendant, through his attorney, Joseph F. Glass, and stipulate that the above captioned cause of action be dismissed with prejudice to filing a future action herein.

FILED
MAR - 8 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Jefferson G. Greer
Attorney for Plaintiff

Joseph F. Glass
Attorney for Defendant

ORDER

And now on this 8th day of March, 1977, there came on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, stipulation of the parties hereto of dismissal, parties hereto having advised the court that all disputes between the parties have been settled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled cause be and the same is hereby dismissed with prejudice to the right of the plaintiff to bring any future action arising from said cause of action.

H. Dale Cook
Judge

ns

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ACCOUNTABILITY BURNS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	76-C-271-B
	)	
US GOVT-CIA (Information Review Committee),	)	
	)	
Defendant.	)	

FILED

MAR 7, 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the Motion to Dismiss filed by the United States of America and the Central Intelligence Agency, the brief in support thereof, the response of the plaintiff styled Plaintiff's Motion for Trial, and, having carefully perused the entire file, being fully advised in the premises, finds:

The pleadings in this action are not concise and direct as required by Rule 8(e) of the Federal Rules of Civil Procedure.

A careful reading of the entire file affirmatively shows that the pleadings of the plaintiff fail to state a claim upon which relief can be granted and the Motion to Dismiss filed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the United States of America and the Central Intelligence Agency be and the same is hereby sustained and the cause of action and complaint are hereby dismissed.

ENTERED this 7th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HENRY L. MORGAN,

Plaintiff,

vs.

FRISCO RAILROAD COMPANY,

Defendant.

76-C-476-B

FILED
MAR 7 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

On September 17, 1976, this Court entered its order granting plaintiff twenty (20) days to secure counsel or furnish documentation that he had tried diligently to obtain counsel and was unsuccessful and renewed his application for such appointment.

On February 1, 1977, the matter was set down on the disposition docket and plaintiff appeared and was represented by one Charlie Phipps (for the purposes of the disposition docket only). At that time plaintiff requested an additional thirty (30) days and requested orally the appointment of counsel. The Court allowed such extension and advised plaintiff to file an application for counsel to be appointed by the Court.

NOW, on this 6th day of March, 1977, no further proceedings having had been had, and the plaintiff once again having failed to abide and comply with the order of this Court,

IT IS ORDERED that this cause of action is dismissed for failure to prosecute.

ENTETED this 7th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LARRY DON ROSE,

Plaintiff,

vs.

CHEMICAL EXPRESS CARRIERS, INC.,

Defendant,

and

TRANSPORTATION EMPLOYEES ASSOCIATION, affiliated with District 2, MEBA, AFL-CIO,

Neceasary Party.

76-C-46-B

ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, Chemical Express Carriers, Inc., and the Answer filed by Transportation Employees Association, affiliated with District 2, MEBA, AFL-CIO (hereinafter referred to as Union), the briefs in support and opposition thereto, the objections to the Findings and Recommendations of the Magistrate and the briefs in connection therewith, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

Jurisdiction is invoked by plaintiff pursuant to 28 U.S.C. §1343(4) and 28 U.S.C. §§2201 and 2202, instituted pursuant to Title 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981.

The Declaratory Judgment Act (28 U.S.C. §2201 and 2202) is not itself a jurisdictional statute. It is procedural in nature and neither aguments nor diminishes the jurisdiction of the federal courts. Moore' Federal Practice, Volume 6A, ¶57.23.

Plaintiff's complaint was filed on April 26, 1976, against the Union and Chemical Express Company. On May 3, 1976, plaintiff filed an "Amended Complaint". Paragraphs 2 and 3 of said "Amended Complaint" state:

> "Plaintiff amends his Complaint by correctly stating the defendant's corpora-e name to be Chemical Express Carriers, Inc., and not Chemical Express Company as originally stated in the plaintiff's Complaint.
>
> "Plaintiff further amends his Complaint by correctly stating the necessary party to be Transportation Employees Association, affiliated with District 2, MEBA, AFL-CIO."

It is noted that plaintiff's Right to Sue Letter was issued by the EEOC on January 26, 1976, and plaintiff alleges in his brief that it was received on January 28, 1976. Plaintiff, therefore, alleges that the action was timely commenced 89 days after the receipt of the right to sue letter. The file reflects that the first summons issued by the plaintiff as to the defendant, Chemical Express Carriers, Inc. was returned unexecuted per the authority of the attorney. (See notation on Marshal's Return of Service). Thereafter a new summons was issued by plaintiff on May 3, 1976, and served on the defendant, Chemical Express Carriers, Inc., on May 4, 1976, some 97 days after the receipt of the right to sue letter.

It is the plaintiff's contention that the Court is dealing with a mere misnomer. Defendant, Chemical Express Carriers, Inc., contends the contrary, relying on Archuleta v. Duffy's Inc., 471 F.2d 33 (10th CCA, 1973).

The Court therefore finds that the Motion to Dismiss filed by the defendant, Chemical Express Carriers, Inc., as to the claim asserted pursuant to Title 42 U.S.C. §2000e et seq. should be sustained.

Turning to the §1981 claim, the alleged incident complained of arose in March, 1974. Plaintiff's Amended Complaint was filed on May 3, 1976.

In Johnson v. Railway Express Agency, 421 U.S. 454 (1975),

the Supreme Court found that the filing of a charge of employment discrimination with the EEOC pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §20003-5, does not toll the running of the period of limitation applicable to an action based on the same facts, instituted under 42 U.S.C. §1981. The Court further found that the limitation period applicable to a §1981 action is governed by the applicable state limitation period. See also Ellis v. Naval Air Rework Facility, Alameda, Cal., 404 F.Supp. 377 (USDC, N.D.Calif. 1975).

The Court has read with interest the cases cited by Chemical Express Company, Inc. with reference to the limitation period applicable. Chemical Express Company, Inc. relies on Seibert v. McCracken, 387 F.Supp. 275 (Okl. 1974)---§1983 action; Battle v. Lawson, 352 F.Supp. 156 (Okl. 1972)---§ 1983 action; and Crosswhite v. Brown, 424 F.2d 495 (10th Cir. 1970)---§1983 action (incidentally this particular case arose out of the Northern District of Oklahoma). In the instant litigation, however, we are not involved with a §1983 claim, but a §1981 claim. Title 42 U.S.C. §1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Case law is replete that when the civil rights statute provides no limitation period, one must look to the analogous state period of limitations. Griffin v. Pacific Maritime Ass'n. 478 F.2d 1118 (9th Cir. 1973).

Having examined the cases dealing with §1981 actions in analogous factual situations, the Court finds that the §1981 action alleged by plaintiff falls within the three year limitation period provided by 12 O.S.C. §95, as follows:

> "Second. Within three (3) years: An action upon a contract express or implied not in writing; ***."

See Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, a5 993 (D.Col. Ct. of App. 1973).

The Court finds that the three year statute of limitations applies to the cause of action alleged in the instant case.

Additionally, the Court notes that the §1981 action was not attacked by the defendant, Chemical Express Carriers, Inc. in its original Motion to Dismiss (that motion went only to the §2000e action), but was briefed by the parties.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss filed by the defendant, Chemical Express Carriers, Inc. be sustained as to the §2000e action.

Although not raised in the Motion to Dismiss, as hereinabove delineated, IT IS ORDERED that the 3 year limitation period provided by the Oklahoma Statutes applies to the action alleged by plaintiffs (the Court additionally notes that Chemical Express Carriers, Inc. has not raised failure to state a claim), and that cause of action remains at the present time for litigation.

The objections and findings and recommendations of the Magistrate are ruled on accordingly.

ENTERED this 7th day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ASSOCIATED MILK PRODUCERS, INC., a corporation,	)	
Plaintiff,	)	
vs.	)	76-C-530(B)
BEATRICE FOODS CO., a corporation,	)	
Defendant.	)	

FILED
MAR 4 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

Upon Motion of Plaintiff seeking voluntary dismissal with prejudice and upon hearing counsel, considering the Stipulation of the parties, and after deliberation, it is Ordered that the Plaintiff's Cause of Action and Complaint ~~is~~ are dismissed with prejudice on this 4th day of March, 1977.

Cecil E. Barrow
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LEROY BEMORE, SR.

Plaintiff,

vs.

OKLAHOMA STEEL CASTINGS COMPANY, INC., a Corporation,

Defendant.

76-C-213-B

ORDER

The Court has for consideration the Motion to Dismiss for Failure to Prosecute filed by the defendant, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

That said Motion to Dismiss for Failure to Prosecute should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss for Failure to Prosecute be and the same is hereby sustained and the cause of action and complaint are hereby dismissed.

ENTERED this 3rd day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

BARBARA JEAN ESTES, individually; SHELLEY DAWN ESTES, a minor, who sues by and through her mother and next friend, BARBARA JEAN ESTES; TERRY DEWAYNE ESTES, a minor, who sues by and through his mother and next friend, BARBARA JEAN ESTES; and BARBARA JEAN ESTES, Administratrix of the Estate of ROBERT ALONZO ESTES, JR., deceased,

Plaintiffs,

vs.

AMERICAN LA FRANCE, INC., a corporation, otherwise known as AMERICAN-LA FRANCE-FOAMITE CORPORATION, a corporation, otherwise known as "AUTOMATIC" SPRINKLER CORPORATION OF AMERICA, a corporation; and GEORGE CLINE,

Defendants.

76-C-415-B

FILED

MAR 3 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court has for consideration the following Motions:

1. Motion to Dismiss filed by the defendant, George Cline;

2. Motion to Remand filed by the plaintiffs.

The Court has carefully perused the entire file and the briefs filed by the parties, and, being fully advised in the premises, finds:

This action was originally commenced in the District Court of Creek County, Bristow Division, State of Oklahoma, seeking damages for the alleged wrongful death of Robert Alonzo Estes, Jr.

The action was timely removed by the defendant, American LaFrance, Inc., otherwise known as American - La France - Foamite Corporation, otherwise known as "Automatic" Sprinkler Corporation of America (hereinafter referred to as corporate defendant), alleging diversity of citizenship and fraudulent joinder of the defendant, George Cline.

The petition of the plaintiffs allege that the defendant, George Cline, sold a certain aerial truck to the City of Sapulpa, and that said truck was designed and manufactured by the corporate defendant. The petition further alleges that on April 9, 1976, Robert Alonzo Estes, Jr. was a Fireman employed by the City of Sapulpa, Oklahoma, and while fighting a fire was mortally injured as a result of the failure of the aerial mechanism. In the answer of the corporate defendant it was alleged that the fire truck in question was purchased by the Fire Department of the City of Sapulpa, Oklahoma, having been purchased in 1948, and being delivered on or about November 19, 1948.

In the Motion to Dismiss filed by the defendant, George Cline, grounds of failure to state a cause of action are raised, supported by an affidavit and exhibit attached thereto which reflect the following:

The affidavit was made by George Howard Cline, Jr., who was personally served with summons on July 9, 1976. He states that he was employed by the corporate defendant as a sales representative in January of 1951, and served in that capacity until 1961. He thereafter left the employ of the corporate defendant and returned to said employment in March of 1967 and remained in said capacity at the time of the affidavit. He states that his father was George Howard Cline, who departed this life on December 30, 1950. George Howard Cline had been a sales representative of the defendant corporation from 1940 until the time of his death, December 30, 1950. He further states under oath that his father, George Howard Cline, sold the firetruck, which is the subject of this litigation, to the City of Sapulpa, Fire Department, in March of April, 1948, and it was delivered in November, 1948. He further states that from 1943 until March 1, 1949, he (George Howard Cline, Jr.) was employed by Bethleham Supply Company. He states under oath that he had no connection whatsoever with the sale, delivery, transactions or inspection of the firetruck in question.

In the complaint filed the allegations as to the named defendant, George Cline, are as follows:

> "Defendant GEORGE CLINE was guilty of the following acts which alone or in concert with the acts of AMERICAN LA FRANCE were, or contributed to, the proximate cause of the accident and the resulting injuries, damages and death of decedent:
>
> "(a) Sale of a defective truck which, because of its defect was unreasonably dangerous to the user;
>
> "(b) Failure to properly inspect the aerial truck so as to discover and remedy the defect before it was transferred to the user in its defective and unreasonably dangerous condition;
>
> "(c) Failure to warn the user of the aerial truck's defective and unreasonably dangerous condition."

The Court has examined the copy of the deposition of George Howard Cline, Jr., submitted by plaintiffs' attorneys by letter of January 13, 1977, wherein they advise that they will substitute the original when signed (as of the date of this order said original has not been submitted to the Clerk's Office for substitution).

In the original Motion to Remand filed by the plaintiffs the following statement was made in paragraph 4:

> "This Court has no jurisdiction over this cause unless the Court sustains defendant George Cline's Motion to Dismiss, since at present there is no diversity of citizenship. We do not at this time concede that George Cline, Jr. was not involved in the sale of the fire truck." (Emphasis supplied)

Thereafter, plaintiffs filed a Motion to Amend Motion to Remand, which stated:

> "1. Plaintiffs pray to amend their Motion to Remand by striking the prayer in paragraph four (4) for abeyance of the Remand Motion pending disposal of Motion to Dismiss of defendant George Cline, and pray that both Motions be considered together, since both predicate the Court's jurisdiction in the case and the same issue is involved in each, to-wit: Does the Petition state a claim against defendant Cline upon which relief can be granted?
>
> "2. Plaintiffs further pray to amend their Motion to Remand by adding the following as paragraph five (5):
>
> "During the time that defendant Cline was sales representative for defendant American La France, he failed to warn the user of the aerial fire truck in question of its defective and unreasonably dangerous condition. Thus, the fact that defendant Cline was not the person who sold said fire truck to the City of Sapulpa does not entirely support the allegation in his Petition for Removal and Motion to Dismiss that no cause of action has been stated which

> would affored relief against Cline, since only paragraph 4-2 and 4-b of plaintiffs' original Petition were based upon Cline's alleged position of sales representative at the time of the sale. The fact that he was not sales representative for American La France until after the sale does not negate plaintiffs' allegations in paragraph 4-c of the original Peition that Cline failed to warn said fire truck's user of the defective and unreasonably dangerous condition which was known to defendant American La France, ***."

Irrespective of which theory plaintiffs asserts against Mr. Cline, they have not overcome the pertinent facts in the instant litigation.

Their initial complaint filed in State Court, which has not been amended (nor have plaintiffs sought leave of Court to amend said complaint),in subparagrapha (a) and (b) asserted allegations that would apply to Mr. Cline had he been the individual who originally sold the fire truck in question. The amendment in the Amended Motion to Remand and paragraph (c) in the original complaint go to failure to warn on the part of Cline.

The Court finds, ab initio, that the wrong person was served and named in the original complaint. In this connection, the Court notes that no motion to substitute parties was ever made by the plaintiffs.

Additionally, the Court finds that paragraph (c) in the original complaint and the allegations contained in the Motion to Amend Motion to Remand are grounded on a cause of action for failure to warn. The Court finds that such allegation does not state a cause of action against George Cline, Jr. Killebrew v. Atchiston, Topeka & Santa Fe Ry. Co., 233 F.Supp. 250 (Okl., 1964); Reed v. Safeway Stores, Inc. and Robert L. Watson, 400 F.Supp. 706 (Okl., 1975).

Turning to the first two allegations against Cline contained in the original comomplaint, the Court finds that said allegations fail to state a cause of action against George Cline, Jr. Kirkland v. General Motors Corporation, 521 P.2d 1353 (Okl. 1974).

The Court further finds that the instant case, as originally

filed does not constitute a misnomer, but the pleadings reflect that plaintiffs sought to sue the father of George Cline, Jr., who originally sold the fire truck involved, who is now deceased. State v. Curry, 257 P.2d 799 (Okl. 1953).

Case law is replete that removal jurisdiction is determined and governed at the time of the removal and not by subsequent amendments.

The Court, therefore, finds, that the Motion to Dismiss of the Defendant, George Cline, Jr. should be sustained for the reasons hereinabove set forth.

The Court further finds that plaintiffs' Motion to Remand should be overruled.

IT IS SO ORDERED.

ENTERED this 3rd day of March, 1977.

Allen E. Barrow

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM L. WHISENHUNT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 76-C-120 (B)
	)	
ARMCO STEEL CORPORATION,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of Dismissal With Prejudice submitted by the parties in the above captioned action, this Court does hereby enter its Order of Dismissal With Prejudice.

SO ORDERED this 3RD day of ~~February~~ MARCH, 1977.

Allen E. Barrow

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF THE STATE OF OKLAHOMA

FILED
MAR - 3 1977
Jack C. Silver, Clerk
U. S. DISTRICT COURT

JEANIE D. HAYNES,)
)
Plaintiff)
)
vs.) No. 75-C-551-B
)
SAFEWAY STORES, INC.,)
)
Defendant)

STIPULATION OF DISMISSAL WITH PREJUDICE

Comes now the plaintiff, through his attorney, Don L. Dees, and the defendant, through its attorney, Joseph F. Glass, and stipulate that the above captioned cause of action be dismissed with prejudice to filing a future action herein.

Glenn P. Bernstein for
Attorney for Plaintiff
Don L. Dees

Attorney for Defendant

ORDER

And now on this 3RD day of March, 1977, there came on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma, stipulation of the parties hereto of dismissal, parties hereto having advised the court that all disputes between the parties have been settled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above styled cause of action & complaint be and the same ~~is~~ are hereby dismissed with prejudice to the right of the plaintiff to bring any future action arising from said cause of action.

Allen E. Barrow
Judge

ns

GM/pf
3-1-77

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JEROME NEY, JR.,

Plaintiff,

Vs.

No. 76-C-275-C

AUTOPILOTS CENTRAL, INC.,

Defendant.

FILED

MAR 3 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

NOW on this 1st day of March, 1977, there comes on a Pre-Trial Conference for the above named Plaintiff, Jerome Ney, Jr., and the Defendant, Autopilots Central, Inc., before the Honorable H. Dale Cook. The Defendant appeared by counsel and Plaintiff failed to appear.

Whereupon, the Court, after hearing statement of counsel, finds that said action should be dismissed without prejudice because of Plaintiff's failure to appear and prosecute said action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the above entitled matter is hereby dismissed without prejudice because of Plaintiff's failure to appear and prosecute said action.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

LAW OFFICES
UNGERMAN,
GRABEL &
UNGERMAN

SIXTH FLOOR
WRIGHT BUILDING
TULSA, OKLAHOMA

5.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 76-C-554-B
Civil Action

ORVILLE LOWE and
PAULINE L. LOWE, Plaintiffs,

ORDER OF DISMISSAL WITH PREJUDICE ON STIPULATION OF PARTIES

On the stipulation of the parties filed herein the Court finds that the above-entitled action should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-entitled action be, and it is hereby dismissed with prejudice.

Dated this 1st day of March, 1977.

Allen E. Barrow
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

ZELDA LUDMAN,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 76-C-142-C
	)	
ALLEN B. SALIKOF and BACHE HALSEY STUART INC.,	)	
	)	
Defendants.	)	

FILED

MAR 1 1977

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

NOW on this 1st day of March, 1977, came on for hearing the Joint Application and Stipulation for Dismissal in the above entitled cause. And the Court, being informed in the premises, finds that the Plaintiff's Complaint, as against the Defendant Bache Halsey Stuart Inc. ("Bache"), and the Cross-Claim of Bache against its Co-Defendant, Allen B. Salikof, should each be dismissed without prejudice to the refiling of the same.

BE IT THEREFORE ORDERED that the Complaint of the Plaintiff as against Bache and Bache's Cross-Claim against its Co-Defendant Allen B. Salikof be and hereby are dismissed without prejudice to the refiling of the same.

H. DALE COOK
United States District Judge

11

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

L. A. Horton, d/b/a Horton's Electrical Center, Plaintiff, vs. Steven H. Janco; William R. Satterfield; Richard S. Sudduth; Michael L. O'Donnell, d/b/a Ace Hi Construction Company; Anchor Concrete Company; Tom Dolan Heating Company; Lights of Tulsa Inc.; Matt Collins, d/b/a World Wide Mechanical; and United States of America, Defendants.	)	Civil No. 75-C-182-B
TULSA FABRICATORS AND DISTRIBUTORS, INC., an Oklahoma Corporation, Plaintiff, vs. STEVEN H. JANCO; WILLIAM R. SATTERFIELD; RICHARD S. SUDDUTH; FARMERS HOME ADMINISTRATION, U.S. DEPARTMENT OF AGRICULTURE, UNITED STATES GOVERNMENT; MICHAEL L. O'DONNELL; ACE HI CONSTRUCTION COMPANY; LIGHTS OF TULSA, INC.; L. A. HORTON, d/b/a HORTON'S ELECTRICAL CENTER; MRS. ROY HILLARD, d/b/a NATIONAL WEATHER STRIPPING AND STORM DOOR COMPANY; CONCRETE SPECIALTIES OF TULSA, INC.; J. M. JACKSON, d/b/a JACKSON COMPANY; W & W PAINTING AND DRYWALL, INC.; DOLAN AIRCONDITIONING SERVICE COMPANY; OLD WORLD PRODUCTS CORPORATION; BRITE SIDE, INC. Defendants.	)	No. 76-C-59

JUDGMENT

On February 10, 1977 at 10:00 a.m., this matter came on for a hearing on the Motion of defendant, UNITED STATES OF AMERICA, for default judgment for the relief demanded in its First Amended Answer, Counterclaim, and Cross-Claim, against the following named defendants in the above-captioned consolidated cases:

1. Michael L. O'Donnell, d/b/a Ace Hi Construction;

2. Mr. Roy Hillard, d/b/a National Weather Stripping and Storm Door Company;

3. Anchor Concrete Company;

4. J. M. Jackson, d/b/a Jackson Company;

5. W & W Painting and Drywall, Inc;

6. Old World Products Corporation;

7. Dolan Air Conditioning Service Company;

8. Richard S. Sudduth;

9. Brite Side, Inc.

The Court being fully advised and having examined the files in both the consolidated cases, the Court finds that the summons were served on each of the above-listed defendant parties in at least one of these consolidated cases, prior to February 14, 1976, and that defendants Richard S. Sudduth, Dolan Air Conditioning Service, and Anchor Concrete Company have filed waivers of interest or disclaimers in the matter, and that the other above-listed defendants have not answered or otherwise pled.

The Court further finds that each of the above-listed defendant parties, with the exception of Michael L. O'Donnell, d/b/a Ace Hi Construction Company, was served with notice of this hearing, and that none of said parties appeared. The Court further notes that service of notice of this hearing was attempted on defendant Michael L. O'Donnell, d/b/a Ace Hi Construction Company, at his last known address. The Court further notes that the one year statutory period within which said defendant, Michael L. O'Donnell, d/b/a Ace Hi Construction Company could have brought action after recording his lien, expired on November 27, 1975, no such action having been taken by said party.

At said hearing on February 10, 1977, defendants United States of America, Stevan H. Janco and William R. Satterfield, also moved for default judgment against defendant Concrete Specialities of Tulsa, Inc. With respect to that defendant, the Court being fully advised and having examined the files and records in both consolidated cases finds that:

1. Concrete Specialities of Tulsa, Inc., although served with a summons, has not filed an answer or otherwise pled in this Court in either of the above-captioned consolidated cases.

2. The one year statutory period within which Concrete Specialities of Tulsa, Inc. could have brought an action based on their mechanics lien in this matter, expired on January 6, 1976, no such action having been undertaken by said party.

The Court further finds that the time within which said above-listed defendants, including Concrete Specialities of Tulsa, Inc. may answer or otherwise move has expired, and that the time for such defendants to answer or otherwise move has not been extended.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that default Judgment is hereby entered in favor of defendant UNITED STATES OF AMERICA on its First Amended Answer, Counterclaim and Cross-Claim, and against the following named defendants in the above-captioned consolidated cases:

1. Michael L. O'Donnell, d/b/a Ace Hi Construction;
2. Mrs. Roy Hillard, d/b/a National Weather Stripping and Storm Door Company;
3. Anchor Concrete Company;
4. J. M. Jackson, d/b/a Jackson Company;
5. W & W Painting and Drywall, Inc.;
6. Old World Products Corporation;
7. Dolan Air Conditioning Service Company;
8. Richard S. Sudduth;
9. Brite Side, Inc.
10. Concrete Specialities of Tulsa, Inc.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that any claim, lien, or encumbrance which the above-named defendants 1 through 10 may have had against the following described real estate is hereby extinguished and removed:

The N/2 of the N/2 of the SE/4 of the NE/4 of the NE/4 and the South 2 Rods of the NE/4 of the NE/4 of the NE/4 of Section 30,

Township 22 North, Range 14 East of the Indian Base and Meridian, according to the U.S. Survey thereof, Tulsa County, Oklahoma.

Dated this 24 day of March, 1977.

Chief United States District Judge